

IN THE HIGH COURT OF SIKKIM AT GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 09-08-2011

CORAM

**HON'BLE MR. JUSTICE S. P. WANGDI,
ACTING CHIEF JUSTICE.**

Criminal Appeal No.05 of 2007

Shri Nar Bahadur Bhandari,
S/o Late Balaram Bhandari,
Congress Bhawan,
Development Area,
Gangtok,
East Sikkim.

... **Appellant**

versus

State of Sikkim
Represented by the
Central Bureau of Investigation,
C.G.O. Complex,
Lodhi Road, New Delhi.

... **Respondent**

For the Appellant : Mr. Bhaskar Sen, Senior Advocate
with Mr. Bhaskar Raj Pradhan and
Shri K. T. Bhutia, Senior
Advocates, Ms. Yangchen D. Gyatso,
Shri Karma Tshering Bhutia and Shri
Yadev Sharma, Advocates.

Shri Nar Bahadur Bhandari in person

 For the Respondent : Shri I. D. Vaid, Special Public
Prosecutor with Shri Shailender
Singh, Inspector, CBI.

J U D G M E N T

Wangdi, ACJ.

This appeal is directed against the judgment dated 26-05-2007 passed by the learned Special Judge, Prevention of Corruption Act, East & North Sikkim at Gangtok in S.T. (P.C. Act) Case No.1/2004 convicting the appellant under section 51(1)(e) of the Prevention and Corruption Act, 1947 and order dated 08-05-2007 sentencing him to suffer imprisonment for one month and pay a fine of Rs.5,000/- in default to undergo further simple imprisonment of one week.

2. Brief facts of the case is that, R.C. Case No.5/84-CIU(A)2615/84 was registered against the appellant, Nar Bahadur Bhandari, former Chief Minister of Sikkim, on the allegation that while holding the office of the Chief Minister of Sikkim from October, 1979 to May, 1984, he misused his official position as public servant and acquired assets disproportionate to his known sources of income in his own name and in the name of his dependant or benami which include a multi-storeyed building at Gangtok worth Rs.30,00,000/-and other properties at Gangtok valued at rupees fifty thousand.

3. On investigation initially conducted by Mr. D.N. Choudhury, the then Deputy Superintendent of Police,



Central Bureau of Investigation, it was revealed that the appellant while holding the post of Chief Minister of Sikkim from 18-10-1979 to 11-05-1984 considered as the "check period" by misusing his official position as public servant, acquired in his own name or in the name of his wife, assets quite disproportionate to his known sources of income which he failed to explain satisfactorily. It has been alleged by the prosecution that before becoming the Chief Minister of Sikkim, the appellant had limited sources of income, both he and his wife being employed as School Teachers in a pay scale of Rs.90-3-410. In 1974, he resigned from service and launched a political party and contested the elections held in 1974 unsuccessfully. He again contested in the 1979 Assembly Elections and returned elected from Soreng constituency and his political party having won by the majority of the seats, was appointed as the Chief Minister at the beginning of the "check period" i.e. 18th October, 1979.

4. In the later part of his term, he was removed from the post of Chief Minister on 11th May, 1984, the date considered as the end of the "check period". It is alleged that the appellant owned and possessed a small house known as "Primula Cottage" before the "check period" valuing not more than Rs.39,175.00 and house hold assets worth Rs.63,741.00. He further had Bank balance of

Rs.1,634.70 in the name of his wife, Smt. Dil Kumari Bhandari. The father of the accused/appellant was an agriculturist and did not inherit any property from him except a dry land measuring 0.75 acre which he sold at Rs.10,000/-. Finding it difficult to live in a rented accommodation at Gangtok, he petitioned to the then Maharaja of Sikkim for a house site which was granted to him and, upon it he built the aforesaid small house known as "Primula Cottage" valued at Rs.39,175.00, in which he lived with his wife and children. During 1981-83, a period falling within the "check period", a five storeyed R.C.C. structure was constructed by him over the land, the value of which exceeded his total income earned by him during the entire "check period". As per the prosecution, incomes of the appellant earned by him during the "check period" were as follows:-

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|--|----------------|
| (1) Income from salary of
Shri Nar Bahadur Bhandari | Rs.1,36,406.68 |
| (2) Income from salary of
Smt. Dil Kumari Bhandari from
October, 79 to Feb.80 | Rs. 2,321.55 |
| (3) Income from rent received from
house at Church Road, Gangtok
and pan shop | Rs.1,11,654.00 |
| (4) Loans obtained from State Bank
of Sikkim by Smt. Dil Kumari
Bhandari for construction of house | Rs. 52,000.00 |
| (5) Income from dividend and interest
earned | Rs. 11,184.60 |

(6) Income from M/S Pine Printers in which Mrs. Dil Kumari Bhandari was a partner	Rs. 53,537.00
(7) Income from "Aaja Ko Sikkim" a paper owned by Mrs. Dil Kumari Bhandari	Rs. 39,555.00
(8) Private loan from Mr. P.P. Goyal	Rs. 30,652.95
Total:	Rs.4,37,311.78

5. The expenditure incurred by the appellant during the "check period" was found to be as stated below:-

(1) House hold expenditure	Rs. 81,190.56
(2) Expenses on education of children	Rs. 31,930.00
(3) Repayment of loan with interest	Rs. 33,094.00
(4) Hotel expenses incurred on guests	Rs. 3,817.00
(5) Licence fee and ground rent paid for pan shop	Rs. 1,150.00
(6) Insurance premium of Smt. Dil Kumari	Rs. 1,511.00
(7) Licence fee for TV/Radio VCR	Rs. 277.00
(8) Expenses incurred by Shri Bhandari as C.M. but not reimbursed. Bhandari with Peerless General Insurance Co.	Rs. 66,540.00
Total:	Rs.2,19,509.56

6. It is, therefore, the case of the prosecution that considering his total income at Rs.4,37,311.78 and his total expenditure at Rs.2,19,509.56 his savings could not have been more than Rs.2,17,802.22 at the end of the "check

period". However, the accused was found in possession of the following assets acquired in his name and in the name of his wife, Smt. D.K. Bhandari, value of which was disproportionate to his known sources of income:-

(1) Multi storeyed building at Church Road, Gangtok (assessed by Chief Technical Examiner of CVC for Rs.15,05,155/- + Rs.1,766/- paid to GMC and for installation of water connection, etc.)	Rs. 15, 06,921.00
(2) Pan shop valued at	Rs. 3,500.00
(3) Land purchased in the name of Shri Kushen Bhandari, the son of Shri Bhandari at village Malbasey	Rs. 7,000.00
(4) Deposit with State Bank of India, Gangtok	Rs. 12,000.00
(5) Bank balance in the name of Shri Nar Bahadur Bhandari and Mrs. Bhandari	Rs. 22,065.09
(6) Investment in shares and Debentures	Rs. 49,005.00
(7) Furniture(including transportation charges)	Rs. 30,650.00
(8) Jeep SKM 93(including repair cost)	Rs. 38,222.00
(9) Weston TV/National VCR	Rs. 30,800.00
(10) Pistol (including cartridges)	Rs. 15,735.75
(11) Investment in Pine Printers	Rs. 86,323.95
(12) Other house hold items	Rs. 70,912.00
(13) Cost of the additions made in Primulla Cottage During 1980-81 as assessed by CTE	Rs. 47,323.00
Total:	Rs.19,20,447.79



7. Based on the above findings, it was alleged that the appellant was found to be in possession of assets, value of which was disproportionate to his known sources of income, which he could not satisfactorily account for, resulting in filing of the charge sheet against him.

8. The learned Special Judge having found prima facie materials that the accused had committed an offence punishable under section 5(2) read with section 5(1)(e) of the P.C. Act, 1947, framed charge under those provisions to which the appellant pleaded not guilty and preferred to go to trial. The learned Special Judge, in the impugned judgment has specifically noted that the appellant while giving explanation as regards the transfer of the land on which "Primula Cottage" stands, to his wife Smt. D.K. Bhandari on 28-02-1981, had stated that it was his wife who constructed the building and that he was not aware of the sources from which she had constructed the house and that "Pine Printers" also exclusively belonged to his wife. Upon consideration of the materials on record and the evidence adduced on behalf of the prosecution, the learned Special Judge was satisfied that the appellant was guilty of the offences and, accordingly, convicted and sentenced him.





9. While pressing the appeal before this Court, Mr. Bhaskar Sen, Ld. Senior Counsel appearing on behalf of the appellant, apart from raising other grounds, sought to lay great stress on the following contentions as the bulwark of his challenge to the impugned judgment:-

(i) That the case of offence charged against the appellant is possession of assets and pecuniary resources disproportionate to his known sources of income during the check period. The only asset found disproportionate to the appellant's known sources of income in the impugned judgment of the learned Special Judge, is a 5½ storeyed building known as "Primula Cottage". In a case of this kind, the foundational requirement is the correctness of the valuation of the property being the basis of the assessment of the alleged disproportionate assets. The prosecution has failed to discharge this burden and, therefore, rendering the charge unsustainable.

(ii) That the prosecution has failed to prove that the property is a benami property of the appellant or that the building was being held by the appellant in the name of his wife. No evidence at all has been led to prove benami as required under the law, a requirement which is strict and mandatory.





(iii) That while assessing the income of the appellant, the prosecution has emphasised on looking into the income of Smt. D.K. Bhandari and not that of the appellant.

(iv) That the prosecution has failed to prove that the "Pine Printers" and News Paper "Aaja Ko Sikkim" belonged to the appellant. On the contrary, it has rather been proved by the prosecution witnesses that it belonged to Smt. D.K. Bhandari, out of which she earned considerable income.

(v) That the learned Special Judge has failed to take into account the income of Smt. D.K. Bhandari out of house rent which has been revealed by the prosecution witnesses themselves.

(vi) That the learned Special Judge while rendering the impugned judgment ought to have taken into consideration the factum of loan taken by Smt. D.K. Bhandari from N.T. Ladhaki established from the seizure memo Ext.P-121 and the admissions of the Investigating Officer during his cross-examination. Mr. Bhaskar Sen elaborated on the above points in seriatim as under:-

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(i) On the question of valuation of "Primula Cottage" building.

10. By referring to the evidence of K.A. Nankani, PW-33, who is a retired S.E., C.P.W.D. attached to the Central Vigilance Commission, New Delhi, as technical examiner at the material time, it was submitted that from his depositions, two significant facts clearly emerge i.e. (a) the reports Exhibits P-66 and P-67 were in respect of two buildings situated at Church Road, Gangtok belonging to Smt. D.K. Bhandari; and (b) the basis of the valuation was not at all stated except to mention that it was on the basis of the standard methods prescribed by the Government of India but bereft of any material particulars as to such standards.

The statement of PW-33 is reproduced below:-

".....In fact I had done the valuation of the two buildings of Mr. N.B. Bhandari and submitted two separate reports. Again said the evaluation reports are with regard to the two buildings belonging to Mrs. D.K. Bhandari. Exhibit P-66 is the report with regard to the building situated at Church Road, Gangtok. Exhibit P-66/a is my signature. Exhibit P-67 is the evaluation report with regard to another building situated at Church Road, Gangtok. Exhibit P-67/a is my signature. The said two reports were forwarded to the CBI by my office vide forwarding letter exhibit P-68. I made the evaluation of the buildings in question on the basis of the standard methods proscribed by the Government of India. Fluctuation of my evaluation can at best be from 5 to 10% here and there. The total evaluation as per my report with regard to the five storeyed building situated at Church Road comes to Rs.15,05,155/- which comprises of building portion, internal water supply and sanitary installations, boundary wall septic tank, internal electrical installations. The cost of land where the building is situated has not been included in my report.

With regard to the other two storeyed building the total cost of construction comprising of same components as mentioned with regard to the first building to Rs.86,498/-.

CROSS EXAMINATION BY COUNSEL FOR ACCUSED

It is true that when I deposed before this Court earlier I had stated that I made the evaluation of the two building to Mr. N.B. Bhandari but subsequently I corrected and stated that the two buildings belongs to Mrs. D.K. Bhandari. It is true that I did not take any consultation with the Sikkim Public Works Department at the time of evaluation of the five storeyed building. It is also true that I have not given the details of different items while arriving at the total evaluation of the buildings. It is true that I have not assess the property as per the Gangtok Schedule of Rates of the C.P.W.D. as the building in question was constructed as per the plinth area rate prescribed by the Government of India. I do not know the cost of 150 Cft. load of cost of sand at Delhi or at Calcutta. At the time of evaluation I did not enquire about the cost of sand, boulders, stones, chips at Gangtok as the same was not considered to be essential. I do not have the idea whether the cost of timer in Sikkim was much cheaper at the relevant time. It is true that the shuttering planks can be used for about 8 times and thereafter the same can be sold. The valuations made by me is not in accordance with the original vouchers and are based on the standards laid down by the Government of India. It is true that I have not given floor wise period of construction but I have mentioned the time of starting and the time of completion of the building."

[emphasis supplied]

11. The deposition of K. J. Singh, PW-34 who had assessed the electrical fittings of the building in question was also referred to and relied upon by the learned senior counsel which is reproduced as under:-

"During 1984 I was attached to the Central Vigilance Commission as Technical Examiner (Electrical). During that year I had come to Gangtok in connection with the evaluation and examination of the properties of one Mrs. D.K. Bhandari, situated at Church Road, Gangtok. In fact I did the evaluation of two buildings. One building is five storeyed and the other is two storeyed. After completion I

submitted the report to my office at Delhi. Exhibit P-69 is my report with regard to the five storeyed building and exhibit P-69/a is my report. Exhibit P-70 is my report with regard to the two storeyed building and exhibit P-70/a is my report. My evaluation was based on the schedule of rates (electrical) internal Part I, 1972 and 1980. Since the two storeyed building was constructed prior to 1980 and as such the evaluation was based on 1972 Schedule and as per the rates prevalent in Gangtok for C.P.W.D. works and for other five storeyed building my evaluation was based on 1980 schedule and C .P.W.D. rates prevailing at Gangtok. For 5 storeyed building the total amount on internal electrical installation is Rs.46,996/- and for another building the total evaluation is Rs.1,938/-.

CROSS EXAMINATION BY COUNSEL FOR ACCUSED.

It is true that in my report I have not given the quantity of different items and their makes as the schedule of rates itself takes care of the different makes. It is true that the electrical installations in each floor have not been given in my report separately."

[emphasis supplied]

12. It was argued that on perusal of the valuation reports, Exbts.66 and 67, considered in the light of their depositions referred to above, the valuation arrived at by the technical examiners of the Central Vigilance Commission, PWs. 33 and 34, are not at all reliable as : -

- (i) The standard method prescribed by the Government of India stated to be the basis for the valuation was not produced and exhibited;
- (ii) Admittedly, the case of the land upon which the building is situated has not been included in the valuation;
- (iii) The Sikkim Public Works Department was not consulted as regards the rates prevalent in Sikkim;



(iv) The details of assessment of different items of the building have not been given in the report;

(iv) PW-33 candidly was not aware of the rates of various construction materials like timber, sand, boulders, stones, chips, etc. in Sikkim;

(vi) The valuations were not based on rates available in the original vouchers but purportedly based on standards laid down by the Government of India which was not produced;

(vii) There is contradiction as to whether the Government schedule of rates of C.P.W.D. was applied at all or not and even if so, the schedule of rates were not produced.

13. It was submitted, therefore, that the schedule of rates and the methods having not been produced and exhibited in Court, neither the appellant nor the Court had the means to examine its correctness rendering the valuation report most unreliable. Relying upon the judgment dated 21-06-2011 of this Court in **Crl. Case No.4/2008**, in the matter of **Padam Lal Gurung vs. State of Sikkim** which also involved a case under section 5(1)(e) read with section 5(2) of the P.C. Act, 1947 in which reliance was placed upon the judgment dated 03-06-2010 in Criminal Appeal No.4/2007 in the matter of **Central Bureau of Investigation vs. Nar Bahadur Bhandari** and, the case of



O.T. Bhutia vs. State of Sikkim : 2010(4) Crimes 166(SIK), Mr. Sen submitted that since the valuation in this case falls in the same category as the ones rejected in those cases, it ought not be accepted. That non production of the SORs of 1972 and 1980 prevalent at Gangtok for C.P.W.D. works, amounts to suppression of material evidence and, therefore, inference under section 114(g) of the Evidence Act, 1872 ought to be drawn against the prosecution.

14. Thus, it was submitted that the very foundation of the case of disproportionate assets having not been established, the prosecution case has to fail on this account alone.

(ii) On the question of Benami.

15. The prosecution has not been able to discharge the heavy burden cast upon it by law to prove that the building "Primula Cottage" is held by Smt. D.K. Bhandari on behalf of the appellant. The allegation that the building was constructed and owned by the appellant has not been established and no evidence has been led at all to prove this. The assertion on behalf of the prosecution that the building was constructed by the appellant in the name of his wife on the land allotted to him by the then ruler of Sikkim after he got it transferred in her name to accommodate his ill gotten money, is not supported by any evidence either direct or





circumstantial. That the circumstances pointed out by the prosecution as leading to such hypothesis have not been proved and, that even assuming that those circumstances are proved, they do not lead to the sole hypothesis of the fact that the building is held benami by Smt. D.K. Bhandari on behalf of the appellant.

16. Reference was also made to a closure report dated 19-06-1985 of Case No.RC-6/84-SPE/CIU(A) submitted by the S.P., C.B.I.:SPE:CIU(A) connected with a charge against the appellant that as the Chief Minister of the State, during the period 1979 to May, 1984, he entered into a criminal conspiracy with the officials of Power Department, Government of Sikkim, in pursuance of which he abused his official position and influenced them to hire a portion of his multi-storied building at Church Road, Gangtok at an exorbitant rent. It was submitted that contrary to the allegation in the present case, the C.B.I. had accepted in the report that Smt. D.K. Bhandari was the owner of the "Primula Cottage" building which was also involved in that case.

 **17.** It is further the submission of Mr. Sen that the prosecution having withheld the above closure report from Court, it was the appellant who filed a copy thereof as Exhibit-A and that even a copy of the Final Report dated

23-09-1998 submitted to the Court by the C.B.I. in that case, was filed by the prosecution on the appellant issuing a notice. That the contents of paragraph 2 of paragraph 6(b) of the closure report to the State Government dated 19-06-1985 Exbt.A and final report dated 23-09-1998 are quite different, the later being manipulated to implicate the appellant falsely. Mr. Sen referred to the following portions of the deposition of Ganesh Verma, the Investigating Officer, PW-52 which are as follows:-

"It is true that I was aware of the said SP'S report in R.C. 6 of 1984 dated 19.6.1985. It is true that I am aware of the contents of the said SP's report dated 19.6.1985. It is true that in the said SP' report in R.C. 6/1984 it has been stated, inter alia, by the Superintendent of Police, Mr. R.N. Kaul "Investigation has further revealed thatShri N.B. Bhandari gifted these plots to his wife in February, 1981 on execution of a gift deed. Smt. D.K. Bhandari w/o Shri Nar Bahadur Bhandari started construction of multi-storeyed building on the said plots in May, 1981, after the approval of the building plan by the executive officer, Gangtok Municipal Corporation." It is true that the said report of the Superintendent of Police dated 19.6.1985 was made and forwarded after the completion of the investigation in R.C. 6 of 1984. It is true that I filed the final report in R.C. case No.6 of 1984 in this Court in the year 1998 being final report No.4/1998 dated 23.9.1998 under my signature. It is true that I had not conducted the investigation in R.C. 6/84. It is true that in the final report in R.C. 6/1984 I have stated vide para 2 of the report that "Thorough investigation has been conducted in this case and it has been found that plot No.573 and 574, Gangtok station block at Church Road was allotted to Shri N.B.Bhandari in 1975 by the then Chogyal of the Sikkim. Later on, in May, 1981 Shri Bhandari constructed a multi-storeyed R.C.C. building on the said plots in the name of his wife, Mrs. Dil Kumari Bhandari and for this purpose he prepared a gift deed of the plot in favour of his wife Mrs. Dil Kumari Bhandari. It is true that what I have mentioned in paragraph 2 of my final report dated 23.9.98 in R.C. 6 OF 1984 is not in the Superintendent of Police's report in R.C. 6 of 1984. It is not correct that I have filed this final

report dated 23.9.98 in R.C. 6 of 1984 to implicate the accused by making false averment before this Hon'ble Court to implicate the accused in the present case."

[emphasis supplied]

18. It was, therefore, submitted that the prosecution had indulged in manipulation of records with the object to implicate the appellant at any cost.

19. Referring to section 5(1)(e) of the Act, it was submitted that there was no evidence on the record that any person on behalf of the appellant was in possession of "Primula Cottage" building, as required under the provision. That there was no allegation of benami. By making reference to the submissions of the learned Public Prosecutor recorded in paragraph 15 of the impugned judgment, it was submitted that the points canvassed as requirement of proof to establish a case of disproportionate assets under Section 5(1)(e) of the P.C. Act, 1947, are the incomplete reproduction of paragraph 13 of the case of **State of Maharashtra vs. Wasudeo Ramchandra Kaidalwar : (1981)3 SCC 199**, with point (2) amongst the points in that paragraph being the most vital, having been left out.

Paragraph 13 referred to is reproduced below:-

"13.The ingredients of the offence of criminal misconduct under Section 5(2) read with Section 5(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove

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the following facts before it can bring a case under Section 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able to account for such resources or property. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under Section 5(1)(e) cannot be higher than the test laid by the court in *Jhingan* case, i.e. to establish his case by a preponderance of probability....." [emphasis supplied]

20. By referring to paragraph 6 of the impugned judgment, it was pointed out that except for the income indicated in Serial No.1 of the list of purported income of the appellant, rest are all that of his wife, Smt. D.K. Bhandari. Relying upon paragraph 12 in the case of **P.L. Gurung vs. State of Sikkim (supra)**, it was submitted that clubbing of the incomes and assets of the husband and wife was impermissible unless Benami transaction is alleged and proved. The case of **KrishnaNand Agnihotri vs. The State of Madhya Pradesh : (1977)1 SCC 816** was referred to, the relevant portions of which are reproduced below:-

"25. The next item of assets to which we must refer is the land at Varanasi which was purchased for Rs.2500 in 1956. The sale deed of this land was in the name of Shanti Devi and hence it must be presumed unless the contrary is shown by the prosecution that the land belonged to Shanti Devi in whose name it was purchased and it stood in the records of the Municipal authorities. The case of the appellant was that this land was purchased by the

father of Shanti Devi for her benefit and the consideration for the sale was also provided by the father of Shanti Devi. Ramadhar Avasthi DW 22, the father of the first husband of Shanti Devi, clearly stated in his evidence that Anant Ram, the father of Shanti Devi had purchased a plot of land for Shanti Devi for Rs.2500 and this was supported by Bachhalal DW 11 who was one of the attesting witnesses to the sale deed. It is indeed difficult to see how this evidence led on behalf of the appellant could be brushed aside and without any evidence whatsoever led on behalf of the prosecution, it could be concluded that the purchase price of the land was paid by the appellant and that the land was purchased by the appellant in the name of Shanti Devi. We must, therefore, exclude this land in computing the total assets belonging to the appellant.

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29. There is also one further asset of Rs.6688 representing the credit balance in the bank account standing in the name of Sheela Devi to which we must refer. This bank account stood in the name of Sheela Devi and hence the burden of proving that the monies in this bank account belonged to the appellant and Sheela Devi was merely his benamidar would be on the prosecution. When we turn to the evidence, we find that the prosecution has failed to discharge this burden. Beyond raising suspicion and doubt in the mind of the court, the prosecution has not been able to adduce any legal evidence of a definite character which would establish the benami character of this bank account. On the contrary, the evidence led on behalf of the appellant shows that Sheela Devi had means of her own. We have already pointed out above that from 1950 to 1953 Sheela Devi was a teacher in Arya Kanya Inter College, Mirzapur and she was also giving tuitions which brought her an income of about Rs.3900 (vide the evidence of Tilak Raj DW 3 and Kali Prasad Srivastava DW 4) and she was also carrying on insurance agency business. She could, therefore, very well have the sum of Rs.6688 in her bank account. Moreover, it may be noted that even after Sheela Devi went away to reside separately from the appellant, this bank account continued to stand in her name. We do not, therefore, think that the prosecution can be said to have established that the sum of Rs.6688 standing to the credit of this bank account belonged to the appellant. And on the same reasoning we must hold that the National Savings Certificates for Rs.65 standing in the name of Sheela Devi also could not be said to be an asset belonging to the appellant, since there was no legal evidence led on behalf of the prosecution which would establish definitely that the consideration for the

purchase of these National Savings Certificates was provided by the appellant."

[emphasis supplied]

21. The law postulates that in a case of the present kind, the initial burden lies on the prosecution to establish whether the appellant has acquired and is in possession of property disproportionate to his known sources of income and the burden would shift upon the appellant only after that, to satisfactorily account for the money received in his hand. The learned counsel referred paragraph 15(a) in **P.L. Gurung's case (supra)** where on this point reliance had been placed upon the cases of **C.S.D. Swami vs. The State : AIR 1960 SC 7** and **DSP, Chennai vs. Inbasagaran : (2006)1 SCC 420**, which are reproduced below:-

"15(a). In C.S.D. Swami (Supra), it has been held by the Hon'ble Supreme Court that in Section 5(3) of the P.C. Act, 1947, a complete departure has been made from criminal jurisprudence still the initial burden lies on the prosecution and in that context it has been observed as follows:-

"(4) It is true that S. 5(3) of the Act, does not create a new offence but only lays down a rule of evidence, enabling the court to raise a presumption of guilt in certain circumstances - a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him."

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(b) We may refer to the case of **DSP, Chennai vs. Inbasakaran : (2006) 1 SCC 420**

"15. There are no two opinions in the matter that the initial burden lies on the prosecution. In the case of C.S.D. Swami v. State this Court has taken the view that in Section 5(3) of the Prevention of Corruption Act, 1947 a complete departure has been made from the criminal jurisprudence, still the initial burden lies on the prosecution and in that context it has been observed as follows; (SCR p.466)

"..... Section 5(3) of the Act, does not create a new offence but only lays down a rule of evidence, enabling the court to raise a presumption of guilt in certain circumstances - a rule which is a complete departure from the established principles of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on the accused to disprove the charge framed against him."

16. Therefore, the initial burden was not the prosecution to establish whether the accused has acquired the property disproportionate to his known source of income or not. But at the same time, it has been held in a case of State of M.P. v. Awadh Kishore Gupta that the accused has to account satisfactorily for the money received in his hand and satisfy the court that his explanation was worthy of acceptance."

(c) Thus, it is now a settled principle that the initial burden is on the prosecution to establish whether the accused has acquired the property disproportionate to his known sources of income or not and the burden shifts upon the accused only thereafter when the accused has to account satisfactorily for the money received in his hand and satisfy the Court that his explanation was worthy of acceptance.

.....

(e) The above has been the consistent view expressed by the Hon'ble Supreme Court and in the case of **G.M. Tank vs. State of Gujarat & Anr. : AIR 2006 SC 2129** it has been held that:

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"20. The provisions contained in Section 5(1)(e) is self-contained provision. The the burden is on the accused to account for the sources for the acquisition of disproportionate assets. As in all other criminal cases wherein the accused is charged with an offence, the prosecution is required to discharge the burden of establishing the charge beyond reasonable doubt."

(f) Therefore, the law that has been postulated as regards the burden of proof of the accused being in possession of property disproportionate to his known sources of income, is upon the prosecution initially. There is no change in this position in Section 13(1)(e) of the P.C. Act, 1988, which is the replacement of 5(1)(e) of the P.C. Act, 1947, and the burden of proof of the guilt of accused is like any other criminal cases, i.e., proof beyond reasonable doubt."

22. The learned Senior Counsel submitted that under sub-paragraph A of paragraph 25 of the impugned judgment, there are six circumstances said to have been established against the appellant but, none of the circumstances taken individually or collectively would show that the property belongs to Mr. N.B. Bhandari. Mr. Sen placed the case of ***Bakhshish Singh vs. State of Punjab (1971)3 SCC 182*** which re-states the principle of proof based on circumstantial evidence with specific reference to paragraphs 9 and 10 which are reproduced below:-

"9. The law relating to circumstantial evidence has been stated by this Court in numerous decisions. It is needless to refer to them as the law on the point is well-settled. In a case resting on circumstantial



evidence, the circumstances put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

10. Even if we accept the entirety of the evidence accepted by the Trial Court as well as by the High Court, we do not think that the guilt of the accused is satisfactorily established."

23. Reference were also made to the cases of **Laxman Naik vs. State of Orissa : (1994)3 SCC 381 paragraph 11** and **Dhananjoy vs. State of West Bengal : (1994)2 SCC 220, paragraph 7.**

24. It was submitted that the very evidence led by the prosecution has clearly established the following:-

- a. That "Primula Cottage" was constructed by Smt.D.K.Bhandari and is owned by her;
- b. That the "Pine Printers" and "Aaja Ko Sikkim" were owned by Smt. D.K. Bhandari from which she used to earn good income;
- c. That Smt. D.K. Bhandari had been handed over with Rs.11,20,000/- in cash after the election in September, 1979 which was later spent by her on the construction of the 5½ storeyed building named "Primula Cottage".
- d. That the appellant had a monthly allowance of Rs.10,000/- which although was not allowed by the learned trial Court but had been fully established by the testimony of the prosecution witnesses.

- e. That Smt. D.K. Bhandari had considerable rental income.
- f. That Smt. D.K. Bhandari had taken loan of Rs.6,00,000/- from N.T. Ladhaki for construction of the house.

25. The learned Counsel urged that the learned trial Court proceeded on three erroneous premises while deciding the case against the appellant which are stated below:-

- i. In economic offences, oral evidence has to be supported by documentary evidence.
- ii. The appellant having failed to produce the documents seized from him during the investigation and held by the prosecution, adverse inference ought to be drawn against him.
- iii. That evidence of hostile witnesses cannot be relied upon.

26. Mr. Sen submitted that the above approach of the Court was grossly erroneous and un-acceptable in law. It was stated that in the first instance the oral evidence being sought to be discredited is that of the prosecution and that the application of the principle of adverse inference contemplated under Section 114(g) in the manner indicated above, is opposed to the law of evidence and that, non-acceptance of the evidence of a hostile witness is contrary to the settled principles. Reference was made in this regard to the case of **P.L. Gurung (supra)** in which the principle has

been discussed by relying upon the decisions of ***Rabindra Kumar Dey vs. State of Orissa : AIR 1977 SC 170*** and ***Balu Sonba Shinde vs. State of Maharashtra : (2002)7 SCC 543***.

27. It is next contended that the evidence relied upon by the appellant are those of the prosecution witnesses who have not been re-cross-examined on the vital aspects and, therefore, have to be accepted as having been admitted by the prosecution. It was thus stated that the prosecution was bound by the evidence of the prosecution witnesses. Mr. Sen cited the decision in a case of ***Raja Ram vs. State of Rajasthan : (2005)5 SCC 272***, the relevant portion of which is reproduced below:-

"9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."

28. It was then contended that the circumstance (d) under para 25(A) of the impugned judgment that Smt. D.K. Bhandari had no independent income, out of which she could have constructed a building like "Primula Cottage" valued



more than Rs.15,00,000/- is an approach which is unknown in law, because Smt. D.K. Bhandari is not an accused in the case. The burden of proof even otherwise lies upon the prosecution to discharge and the appellant was not obliged under the law to do so. The fact that Smt. D.K. Bhandari indeed has income was fully established by the prosecution witnesses.

29. It was submitted that in the present case, the prosecution had failed to produce certain vital documents which were seized by the prosecution and, therefore, adverse inference ought to be drawn against the prosecution. Those would have clearly established that Smt. D.K. Bhandari had sufficient income to construct the building.

30. It was then submitted that in a case of the present kind, it is mandatory for the prosecution to have conducted a preliminary enquiry before launching investigation. This having not done, the case of the prosecution fails on this account alone. The following decisions were cited in support of this contention:-

30.1 In the case *of P. Sirajuddin, Etc. vs State of Madras : (1970)1 SCC 595*, it has been held as follows:-

"17. In our view the procedure adopted against the appellant before the laying of the first information report though not in terms forbidden by law, was so unprecedented and outrageous as to shock one's sense of justice and fair play. No doubt when allegations about dishonesty of a person of the



appellant's rank were brought to the notice of the Chief Minister it was his duty to direct an enquiry into the matter. The Chief Minister in our view pursued the right course. The High Court was not impressed by the allegation of the appellant that the Chief Minister was moved to take an initiative at the instance of a person who was going to benefit by the retirement of the appellant and who was said to be a relation of the Chief Minister. The High Court rightly held that the relationship between the said person and the Chief Minister, if any, was so distant that it could not possibly have influenced him and we are of the same view. Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for some one in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge-sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be restored to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report."



30.2 In the case of ***Ashok Tshering Bhutia vs. State of Sikkim : (2011)4 SCC 402*** it has been held as follows:-

"17. This Court in P.Sirajuddin v. State of Madras and State of Haryana v. Bhajan Lal has categorically held that before a public servant is charged with an act of dishonesty which amounts to serious misdemeanour and an FIR is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. Such a course has not been adopted by the prosecution though the law declared by this Court is binding on everyone in view of the provisions of Article 141 of the Constitution, which would by all means override the statutory provisions of CrPC and such an irregularity is not curable nor does it fall within the ambit of Section 465 CrPC. However, as the issue is being raised first time before this Court, it is not worth further consideration. More so, the aforesaid observations do not lay down law of universal application."

31. Mr. I.D. Vaid, the learned Special Public Prosecutor, on the other hand, submitted that section 5(1)(e) of the P.C. Act, 1947 specifically provides that if a public servant or any person on his behalf is in possession of property disproportionate to his known sources of income which he cannot satisfactorily account for, he will be liable for punishment prescribed under section 5(2) of the Act. He submits the charge framed against the appellant, clearly spelt out that the appellant had been in possession of pecuniary resources of property in his name, in the name of his wife, Smt. D.K. Bhandari and others, to the extent of Rs.16,37,270/- which were disproportionate to his known sources of income, for which he could not satisfactorily



account for, thereby committing an offence punishable under section 5(2) read with section 5(1)(e) of the P.C. Act, 1947.

32. It is submitted that in answer to the charge, the appellant had stated that he was not aware of the sources from which his wife Smt. D.K. Bhandari had constructed the house and that "Pine Printers" Press also belonged to her exclusively. That this stand of the appellant is an after thought as the case was registered in 1984, but the statement was made only in the year 1996 when the charge was framed. It is stated that the sequence of events of the land being allotted to the appellant by the then Maharaja in 1975 vide Exhibit P-58, the appellant transferring to his wife Smt. D.K. Bhandari vide Gift Deed dated 28-02-1981, Exhibit P-59 and, the construction of the building by his wife during the "check period" were circumstances which clearly led to the conclusion that it was done for an oblique purpose because as per Mr. Vaid, there was no necessity of such a transfer, as the appellant and his wife were living together and the wife is naturally an "Ardhangini" i.e. better half of the husband, the appellant. Therefore, the only object of such transfer was to accommodate the appellant's ill gotten money.

33. Mr. Vaid submits that there are established circumstances, namely, transfer of the land to his wife,



refusal of the appellant to answer the charge on the first date and the plea that the house was constructed by his wife Smt. D.K. Bhandari as an after thought which proves that the building 'Primula Cottage' is being held by Smt. D. K. Bhandari on behalf of the appellant. As regards the question on the reliability of valuation of the properties raised on behalf of the appellant, it was submitted that it was prepared by K.A. Nankani, PW-33, who was technically qualified, on the basis of the standard method accepted by the Government and that the appellant had accepted the valuation when questioned under section 313 of the Code of Criminal Procedure.

34. That the building in question was constructed by the wife would have been best proved by her but the appellant failed to produce her as a witness and also did not lead any other evidence. Having withheld the best evidence available, an adverse inference would naturally have to be drawn against the appellant. That the expenditure incurred by the appellant have been well established by various witnesses, namely PW-1, PW-3, PW-8, PW-9, PW-12, PW-15, PW-17, PW-27, PW-35 and PW28.

 **35.** As per the learned Special Public Prosecutor, the value of the asset i.e. "Primula Cottage" is Rs.15,05,155/-, the expenditure during the "check period" was Rs.4,04,510/-,



and the income Rs.6,84,531/- and, therefore, the appellant had acquired assets to the extent of Rs.12,25,134/- which were disproportionate to his known sources of income which he could not satisfactorily explain. This fact is fortified when it has come in evidence that the appellant and his wife, Smt. D.K. Bhandari, hailed from moderate families both having worked as Teachers before the appellant joined politics and became the Chief Minister of Sikkim. That the alleged claim of Rs.11,20,000/- received by the wife of the appellant, Smt. D.K. Bhandari, does not fall within the meaning of known sources of income. Referring to the decision of **N. Rama Krishnaiya vs. State of Andhra Pradesh : (2009) Cri.J. 1767**, it was submitted that a receipt from windfall or gains of graft, crime or material secretion by persons would not be receipt of "known sources of income" for a public servant. Even otherwise, as per Mr. Vaid, the evidence of PW-3, PW-45 and PW-46 upon whom the appellant relies are not supported by any cogent evidence, namely, Bank accounts, documents, etc. PW-45 and PW-46 have been specifically cross-examined on this and duly controverted on behalf of the prosecution. Mr. Vaid placed a number of judgments in support of his submissions on the various aspects which are as follows:-

36. In the case of **K. Ponnuswamy vs. State of Tamil Nadu : (2001)6 SCC 674**, the following has been noticed on the facts of that case:-

"6. Before the appellant came into the political arena he was employed as a Lecturer in Government Arts College. It has been shown that in 1973 the appellant had taken a crop loan from Bank of India for a sum of Rs.13,000. That amount had not been repaid by the appellant. Ultimately a suit came to be filed and the amount had to be collected in execution of decree in that suit. In 1985 the appellant had borrowed a sum of Rs.5000 from R. Palanivelu (PW 16) who was also working as a Lecturer along with him. For this loan the appellant had executed a promissory note. The financial condition of the appellant was such that he was unable to repay the loan. Ultimately a suit had to be filed against him and a decree came to be passed. Even after passing of the decree the amount was not repaid. The decree had to be executed. The decretal amount had to be recovered from the salary of the appellant. This clearly shows that before he became a Minister the appellant's financial condition was very weak."

37. In the case of **K. Veeraswamy : (1991)3 SCC 655**, it has been held as follows:-

"71.....

The ingredients of the offence of criminal misconduct under Section 5(2) read with Section 5(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can bring a case under Section 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution, and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the offence or criminal misconduct under Section 5(1) is complete, unless the accused is able to account for such resources or property. The burden then shifts to the accused to

satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under Section 5(1)(e) cannot be higher than the test laid by the Court in Jhangan case 19 i.e. to establish his case by a preponderance of probability. That test was laid down by the Court following the dictum of Viscount Sankey, L.C. in *Woolmington v. Director of Public Prosecutions*."

72. The soundness of the reasoning in Wasudeo Ramachandra Kaidalwar case 18 has been doubted. Counsel for the appellant urged that the view taken on Section 5(3) cannot be imported to clause (e) of Section 5(1) and the decision, therefore, requires reconsideration. But we do not think that the decision requires reconsideration. It is significant to note that there is useful parallel found in Section 5(3) and clause (e) of Section 5(1). Clause (e) creates a statutory offence which must be proved by the prosecution. It is for the prosecution to prove that the accused or any person on his behalf, has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is discharged by the prosecution, it is for the accused to account satisfactorily for the disproportionality of the properties possessed by him. The section makes available statutory defence which must be proved by the accused. It is a restricted defence that is accorded to the accused to account for the disproportionality of the assets over the income. But the legal burden of proof placed on the accused is not so onerous as that of the prosecution. However, it is just not throwing some doubt on the prosecution version. The legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily". That means the accused has to satisfy the court that his explanation is worthy of acceptance. The burden of proof placed on the accused is an evidential burden though not a persuasive burden. The accused however, could discharge that burden of proof "on the balance of probabilities" either from the evidence of the prosecution and/or evidence from the defence.

74. Counsel for the appellant however, submitted that there is no law prohibiting a public servant having in his possession assets disproportionate to his known sources of income and such possession becomes an offence of criminal misconduct only when the accused is unable to account for it. Counsel seems to be focussing too much only on one part of

clause (e) of Section 5(1). The first part of clause (e) of Section 5(1) as seen earlier relates to the proof of assets possessed by the public servant. When the prosecution proves that the public servant possesses assets disproportionate to his known sources of income, the offence of criminal misconduct is attributed to the public servant. However, it is open to the public servant to satisfactorily account for such disproportionality of assets. But that is not the same thing to state that there is no offence till the public servant is able to account for the excess of assets. If one possesses assets beyond his legitimate means, it goes without saying that the excess is out of ill-gotten gain. The assets are not drawn like nitrogen from the air. It has to be acquired for which means are necessary. It is for the public servant to prove the source of income or the means by which he acquired the assets. That is the substance of clause (e) of Section 5(1)."

38. In the case of ***Gajendra Singh v. State of Uttar Pradesh*** : AIR 1975 SC 1703, it has been held as follows:-

"7.

"We are, however, not impressed with the reasoning put forward by the counsel for the appellant. In our opinion, the non-examination of Shri Rambeti is the strongest possible circumstance to discredit the defence version, because she alone could have been in the best position to explain whether the injuries were caused as a result of the shot fired by Shyampal Singh or just accidentally."

39. The learned Special Public Prosecutor re-emphasised his submissions that Smt. D.K. Bhandari, who was the best witness to prove that the building was hers and that she had the necessary resources for its construction, did not appear in the witness box. It was stated that Smt. D.K. Bhandari did not respond to at least three notices issued by the Investigating Officer, PW-53. In above premises, the prosecution had been successful in establishing beyond any reasonable doubt that the appellant was in possession of



assets value of which were beyond his known sources of income which he failed to explain satisfactorily and, therefore, conviction and the sentence passed against him were justified.

40. Replying to the contentions of the learned Special Public Prosecutor, Mr. B.R. Pradhan, learned Senior Counsel submitted that under Section 101 of the Evidence Act, 1872, the burden of proof is upon the one who asserts and, therefore, it is for the prosecution to prove the allegations beyond any reasonable doubt which they have failed to discharge. The adverse inference being sought to be drawn against the appellant for non-production of Smt. D.K. Bhandari as the best evidence would rather lie against the prosecution as admittedly she is the best evidence to state on that. That it has been the case of the appellant right from inception, that the building in question belongs to his wife, yet the prosecution has chosen not to investigate on this and has persisted on pursuing the case against the accused. Alternatively, it has been argued that even accepting that the value of the building is Rs.13,54,689/- as arrived at by the Ld. Trial Court and, assuming that the building was constructed by the appellant, it will be found that it falls within limits of his income and not in excess of it because :



- 
- i. the appellant had received Rs.6,00,000/- as party fund has not been refuted; and
 - ii. that the appellant had received Rs.10,000/- per month during the "check period" total of which amounts to Rs.6,50,000/- has remained uncontroverted; and
 - iii. as admitted by the Investigating Officer, PW-53 loan document was Rs.6,00,000/- seized under Exhibit-121 was suppressed.

41. All these three incomes taken together would amount to Rs.17,40,000/- and, on deduction of the value of the building being Rs.13,54,689/- which is the alleged disproportionate asset, there is a surplus of Rs.3,80,311/- with the appellant. This position would continue even if the receipt of Rs.11,20,000/- by Smt. D.K. Bhandari is not accepted. Therefore, the case of the prosecution fails also on this account.

42. Having heard the learned Counsels on both the sides and on consideration of the evidence and the materials on record, I find that there is no dispute on the position that the bulk of the alleged disproportionate assets is the building "Primula Cottage" value of which as arrived at by the Ld. Trial Court is Rs.13,54,639/-. It would, therefore, be necessary to find out as to whether the valuation of this building assessed by the prosecution is reliable or not as the entire case would hinge on this. We may, therefore, examine the evidence led by the prosecution.





43. Mr. K.A. Nankani, PW-33, who evaluated the civil works, is a retired Superintending Engineer, C.P.W.D., attached to the Central Vigilance Commission in 1984 as a Technical Examiner and submitted his valuation report Exbt. P-66. As the Exbt.P-66 is the valuation in respect of the "Primula Cottage" building we shall be restricting our discussions only on that. We have already extracted the entire deposition of PW-33 earlier and, therefore, for the sake of brevity, we need not do so again. He has stated that the valuation of the building in question was done on the basis of standard methods prescribed by the Government of India but in his cross-examination, he has admitted that in the valuation he has not given the details of different items while arriving at the total valuation. That he did not assess the property as per the Gangtok schedule of rates of the C.P.W.D. as the building in question was constructed as per the plinth area rate prescribed by the Government of India. He did not know the cost of 150 cft. load of cost of sand at Delhi or at Calcutta. That at the time of evaluation he did not enquire about the cost of sand, boulders, stones, chips at Gangtok, as it was not considered necessary. He did not know that the cost of timber in Sikkim was much cheaper at the relevant time. That the valuations made by him are not





in accordance with the original vouchers and are based on the standards laid down by the Government of India.

44. Mr. K. J. Singh, PW-34 who is also a Superintending Engineer, C.P.W.D. and attached to the Central Vigilance Commission as Technical Examiner (Electrical) stated that he did the evaluation of the electrical fittings of the properties of Smt. D.K. Bhandari, situated at Church Road, Gangtok and submitted his reports Exhibits P-69 and P-70 (Exbt. P-69 being the relevant report) based on the schedule of rates (Electrical) of 1972 and 1980. For the valuation of the 5½ storeyed building he had applied the 1980 schedule at C.P.W.D. rates prevalent at Gangtok in respect of the electrical installations.

45. From the above, therefore, it is an admitted position that the standard methods prescribed by the Government of India alleged to be the basis of the assessment have not been produced and exhibited. The details of different items by which the total evaluation of the buildings was arrived at have not been indicated. It is also quite evident and admittedly so, that the evaluation was not done as per the Gangtok schedule of rates of the C.P.W.D. and that the witness was unaware of the value of the various construction materials namely sand, boulders, stone, chips etc. at Gangtok. It is also evident that valuations were not done in





accordance with the original vouchers. The 1972 and 1980 schedule of rates of the C.P.W.D. at Gangtok, based upon which the valuation of the electrical fittings was arrived at have not been produced and rendered in evidence.

46. The learned Special Public Prosecutor fairly concedes that it was essential for the prosecution to have produced all those including the sheets of paper on which the calculations had been done. Under such circumstances, the correctness of the valuation neither could be tested nor examined by the Court. On careful scrutiny of the valuation reports Exbts.P-66 and P-69, we find that those are quite vague and devoid of any material particulars as regards the calculations forming the basis of the valuations. These vital facts do not appear to have been taken note of by the learned trial Court. Under similar circumstances this Court in ***Crl. Appeal No.4/2008*** in ***Padam Lal Gurung vs. State of Sikkim; Crl. Appeal No.4/2010; Central Bureau of Investigation vs. N.B. Bhandari and in O.T. Bhutia vs. State of Sikkim (2010) 4 Crimes 466 (supra)***, quashed the prosecution cases as the valuation of the assets which formed the basis of the alleged disproportionate assets were found to be unreliable for the same inadequacies found in the present case.

47. The relevant portions of the judgment in P. L. Gurung's case may be referred to below:-



"(m) The above being the quality of evidence pertaining to the valuation of the buildings which is the basis for assessing the bulk of the alleged disproportionate assets of the appellant serious doubt arises as to the veracity of the prosecution case. When apart from then serious discrepancies and contradictions appearing in the evidence, the valuation reports which admittedly are based upon erroneous and inflated rates on different items of the building and others based upon assumptions or upon rates said to be under the schedule of a particular year when no such SoR was prescribed and the fact that the SoRs were never produced, the very basis of the case of the prosecution of the appellant being in possession of disproportionate assets is rendered unreliable. We may refer to the decision of this Court in the case of **Central Bureau of Investigation vs. Nar Bahadur Bhandari** in Criminal Appeal No.4 of 2007 decided on 03-08-2010 where, in a similar circumstance, it has been held as follows:-

"11. The trial court reduced the value of construction from the Rs.78,99,840/- to Rs.59,75,000/-. In order to prove that the valuation of the construction was of Rs.78,99,840/-, PW 8, Executive Engineer (Civil) attached to CBI on deputation since 1st June, 1998, had deposed. He stated that valuation was made on the basis of Delhi Plinth Area Rates and Delhi Schedule Rates. Neither Delhi Plinth Area Rates, nor Delhi Schedule Rates was tendered in evidence. He accepted that Delhi Plinth Area rates and Delhi Schedule Rates are applicable to Delhi. He stated that the valuation was made by way of approximation.

12. Further, assuming the measurements taken by PW 8 are correct, in the absence of Delhi Plinth Area Rates and Delhi Schedule Rates, even if they were applicable, the Court had no means to gather what would be the appropriate value of the said construction."

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12. Further, assuming the measurements taken by PW 8 are correct, in the absence of Delhi Plinth Area Rates and Delhi Schedule Rates, even if they were applicable, the Court had no means to gather what would be the appropriate value of the said construction."

[emphasis supplied]

48. The law being such which has direct application to the present case, I am of the considered view that the valuation of the building "Primula Cottage" being completely unreliable, the charge of the prosecution of the appellant being in possession of assets value of which are disproportionate to his known sources of income which he failed to explain satisfactorily, cannot sustain. On this aspect, Mr. Vaid submitted that the valuation has not been disputed by the appellant as he had stated in his statement under Section 313 Cr.P.C. that 'It is a matter of record'. The case of **N. P. Jharia vs. The State of Madhya Pradesh : 2007 Cri.L.J. 3745 (SC)** was referred to by him in support of his contention.

49. The submission of Mr. Vaid does not appear to be convincing. The statement of the accused under Section 313 Cr.P.C. is not a substantive evidence, but requires to be considered in the light of the surrounding circumstances. This apart, it is the court which has to be satisfied as to



whether any fact in a case stands proved or not. Justice is not only to be done but must appear to have been done. Considering the nature and quality of evidence as already discussed, the valuation of the building does not inspire confidence of this Court. **N. P. Jharia's** case was one where the valuation was not in question. The decision of the Hon'ble Supreme Court reported in **2007 Cri.L.J. 3745** arose from the judgment of the Madhya Pradesh High Court reported in **2001 Cri.L.J. 3212** which sets out the brief facts of the case, paragraph 6 of which may be referred to, which is reproduced below: -

"6. In this appeal it has been argued that (a) the calculation of the income and expenditure by the trial Court is erroneous and against the evidence on record, (b) there was in fact no further investigation or reinvestigation and the charge sheet has been submitted on the same evidence on which the investigating agency had formed the opinion that no case is made out and (c) the order sanctioning the prosecution is without application of mind as the relevant material was not considered. These are the three points which arise for determination in this appeal."

50. However, in spite of the above position, we may further examine on the charge of the prosecution of the building in question being held by Smt. D.K. Bhandari, his wife on behalf of the appellant. It may be relevant to note here that apart from the recital made in the passing that the property is being held benami, the prosecution has not made any effort to prove this allegation but has proceeded on the assumption that the appellant had acquired it during "check

period" in the name of his wife, Smt. D.K. Bhandari. The law as regards the proof of benami is well settled by a catena of decisions of the Apex Court and it would be sufficient to cite the case of **State of Madhya Pradesh v. Krishna Nand Agnihotri (1977)** the relevant portion of which reads as under:-

"26. It is difficult to see how in the face of this overwhelming evidence it could be concluded that the sum of Rs.11,180 lying in fixed deposit in Shanti Devi's name was an asset belonging to the appellant. It must be remembered that the fixed deposit stood in the name of Shanti Devi and the burden, therefore, lay on the prosecution to show that Shanti Devi was a benamidar of the appellant. It is well settled that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises as a substitute for proof. (Vide Jayadayaal Poddar v. Mst. Sibi Hazra). It is not enough merely to show circumstances which might create suspicion, because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. Here, in the present case, no evidence at all was led on the side of the prosecution to show that the monies lying in fixed deposit in Shanti Devi's name were provided by the appellant and howsoever strong may be the suspicion of the court in this connection it cannot take the place of proof. It must, therefore, be held that the prosecution has failed to show that the sum of Rs.11,180 lying in fixed deposit in Shanti Devi's name belonged to the appellant."

[emphasis supplied]

51. We may for convenience also reproduce the relevant portion of the report in Case No.RC-6/84-SPE/CIU(A) which reads as follows:-

"4. ALLEGATION

It was alleged that Shri Nar Bahadur Bhandari, while functioning as Chief Minister of Sikkim during the period October, 1979 to May, 1984, entered into a criminal conspiracy with the officials of Power Department, Govt. of Sikkim and in pursuance of the said criminal conspiracy, he abused his official position and influenced the said officials of the Power Department to hire a portion of this multi-storied building at Church Road, Gangtok at an exorbitant rent of Rs.9,000/- p.m. The Power Department also incurred huge expenditure towards fittings/attachments in the said building to make it suitable for office accommodation.

6.(b) Facts Disclosed by enquiry

Investigation has further revealed that plot No.573 & 574, Gangtok were allotted to Shri Nar Bahadur Bhandari in 1975, by the then Chogyal of Sikkim, when he petitioner to the Chogyal to allot him some land for construction of a small dwelling house, as he could not afford to stay in a rented house. Shri Nar Bahadur Bhandari constructed a small dwelling house in a portion of the said plot in 1975-76 at an estimated cost of Rs.64,000/-. Shri Nar Bahadur Bhandari gifted these plots to his wife in Feb.1981 on execution of a gift deed. Smt. D.K. Bhandari w/o Shri Nar Bahadur Bhandari started construction of multi storeyed building on the said plots in May, 1981, after the approval of the building plan by the Executive Officer, Gangtok Municipal Corporation. She applied to the G.M.C.

Smt. D.K. Bhandari, in response to the said advertisement, offered 1st and 2nd floor of her multi-storeyed building at Church Road, Gangtok vide her letter dated 30.03.82.

On receipt of the said offer, the Divisional Engineer (Telephones) Gangtok took approval of the competent authority to hire the said building and also requested the Supdt. Engineer, SPWD, Gangtok vide his letter dated 15.10.82 to assess the rent of the building of Smt D.K. Bhandari.



.....
 ... The Divisional Engineer vide his letter dated 8.11.81, requested Smt. D.K. Bhandari to hand over the Building for office-cum-residential accommodation as per the rent as assessed by the SPWD. Smt. D.K. Bhandari however decline to hand over the building to the D.E. Telephone vide her letter dated 15.12.82 on the pretext that water and power connection were not available and the rent assessed by the SPWD was to meagre.

..... However, in the said proposal, Shri LP. Tiwari did not indicate that the office of the Power Deptt. had already been shifted to the building of Smt. D.K. Bhandari w/o Shri N.B. Bhandari w.e.f. 1.2.83.

..... Pending approval of the Cabinet, Shri L.P. Tiwari issued a formal letter of acceptance of the tender of Shri Phul Chand Aggrawal on 22.9.83, however, Shri L.P. Tiwari ordered the shifting of Head Office to the multi-storeyed building of Smt. D.K. Bhandari on 1.2.83.

..... Investigation has also disclosed that Smt. D.K. Bhandari did not make any offer to Power Deptt. Govt. of Sikkim, Gangtok for renting out the said building. The said Office of the Power Deptt. was shifted to the multi-storeyed building of Smt. D.K. Bhandari w.e.f. 1.2.83.

..... Investigation has also disclosed that the rent of the building of Smt. D.K. Bhandari was assessed at the schedule of rate of rent fixed by the Chief Engineer, SPWD, Gangtok.

..... (ii) Shri L.P. Tiwari ordered for the shifting of the office to the building of Smt. D.K. Bhandari without the approval of the Govt. of Sikkim. Shri L.P. Tiwari ordered the shifting of the office to the building of Smt. D.K. Bhandari on 1.2.83, when the contract for demolition of semi-structure housing the Power Deptt. was awarded on 4.6.83. Thus there was no emergency circumstances to shift the office in Feb.1983. The rent paid for the period Feb. to May, 1983 is wholly unjustified.

6.(i)(c): Explanation of the suspected/accused persons

He also ordered shifting of the office to the building of Smt. D.K. Bhandari w.e.f. 1.2.83, after it was orally approved by the Power Minister.

6.(i)(d) Discussion of Evidence both for and against the suspected/accused persons.



There is sufficient oral as well as documentary evidence to prove that the ground floor, 1st & 2nd floor of the multi-storeyed building of Smt. D.K. Bhandari were taken on rent by the Power Department, Govt. of Sikkim, Gangtok w.e.f.1.2.83 @ 8796/- p.m.

..... It has also been found that the rent paid by the Power Deptt. to Smt. D.K. Bhandari was not exorbitant and it was according to the rate fixed and on the same rates, Govt. of Sikkim had hired other buildings at Gangtok. Even the Divisional Engineer (Telephones), Gangtok had offered the same rent to Smt. D.K. Bhandari for 1st & 2nd floor.

.....
.....
..... That Shri L.P. Tiwari ordered the shifting of the Head Office, Power Deptt. to the building of Smt. D.K. Bhandari without the approval of the Govt.

.....
..... However, he did not take approval on file to shift the Head Office to the building of Smt. D.K. Bhandari till 2.3.83, he may be put up the proposal for the same when in fact he had shifted the office in Feb. 1983 itself.

.....
..... Thus, there was no reasons/grounds to shift the Office In Feb. 1983. Rather the rent paid for the period February to May, 1983 is unjustified and amounted to a favour shown to Smt. D.K. Bhandari.

6.(i)(e): Opinion as to whether the allegation is fully proved and against whom.

The allegation made in the FIR has not been proved. However, certain lapses have been found against Shri L.P. Tiwari, which are given in para 6(i) (d) above. Nothing has been found against Shri N.B. Bhandari.

Conclusion

(i) Keeping in view the facts discussed above, the case is sent up for such action as may be deemed fit against Shri L.P. Tiwari, Secretary-cum-Chief Engineer, Power Department, Govt. of Sikkim, Gangtok.

(ii) No action against Shri Nar Bahadur Bhandari is recommended.

Sd/-
Superintendent of Police
CBI:SPE-CIU-(A)
New Delhi

[emphasis supplied]

52. Apart from the above, from the evidence of at least 19 prosecution witnesses, it has been proved beyond doubt that the building was constructed by Smt. D.K. Bhandari and owned and possessed by her. Out of them, we may refer to the statements of PW-3, PW-6, PW-7, PW-10, PW-28, PW-31, PW39, PW52 and PW-53. The relevant portions of whose statements are reproduced below in seriatim:-

PW-3:

".....As far as my knowledge goes Mrs. D.K. Bhandari was the exclusive owner of the building known as Primulla Cottage. This fact I know because I was very close to Mrs. And Mrs. Bhandari."

PW-6:

"..... In the year 1980 I was the Executive Officer of the then Gangtok Municipal Corporation. As Administrative Officer of the said Corporation I was looking after all the administrative functions of the corporation. Apart from the administrative work I was also to recommend for the approval of the Blue Print Plans for constructions of the buildings. During that period I received an application from Smt. D.K. Bhandari with the building plan proposed to be constructed at Arithang, Gangtok. Exhibit P-1 is the application submitted by Smt. D.K. Bhandari. Exhibit P-2 is the proposed Blue Print Plan submitted alongwith the application. As per the record the applicant has paid a fee for technical checking amounting to Rs.290.25. I do not remember the Bank Receipt number for the same. But the same is reflected in the notings, according to which the Bank Receipt number is 22060, & 22061. The accused person had made an application for purchasing building by-laws and we had issued receipt to that effect. Exhibit P-1 is the said receipt.

..... At C.P. 7 of the file exhibit P-5 the occupancy certificate has been enclosed. The said certificate is dated 22-10-1982. The document at C.P. 4 in the file exhibit P-5 is the construction order issued to the applicant by the corporation. It is dated 23-5-1981. After receiving the construction order the person concerned could start with the construction of the building.

Q

CROSS EXAMINATION BY COUNSEL

It is true that from the record it appears that the application for the construction of the building was made by Smt. D.K. Bhandari and not by the accused and the plan was approved by the Corporation in favour of Smt. D.K. Bhandari. It is also true that the occupancy certificate was also issued in favour of Smt. D.K. Bhandari on the basis of the application made by her. Exhibit D-1 is the said application submitted by Smt. D.K. Bhandari for issuance of occupancy certificate."

PW-7:

"..... The owner of the building at Church Road was Smt. D.K. Bhandari. At the time of the execution of the agreement we came to know that the owner of the building in question was Smt. D.K. Bhandari."

CROSS EXAMINATION BY COUNSEL

"As per the record exhibit D-2 the period of occupancy by my department was from 1-2-1983 to 15-6-1984 and the total rent paid to the owner was Rs.1,45,134/- and we paid the said amount to Mrs. D.K. Bhandari."

PW-10:

"I am attached to the Power Department, Government of Sikkim since 1967. During 1984 I was posted at Gangtok Executive Engineer.

Exhibit P-10 is the reply given by the Power Department to Smt. D.K. Bhandari in connection with the application for power connection at Church road. The said letter might have been signed by my Assistant Engineer. This is with regard to the estimated cost of installation of power connection. Exhibits P-11 and P-12 are the two bank receipts for the installation of the electric connection paid by Mrs. D.K. Bhandari in different two heads one amounting to Rs.526/- and the other for Rs.225/-."

PW-28:

"From December 1980 to the month of June 1989 I was attached to Sikkim Investigation Division, Central Water Commission, Gangtok. It may be in the month of May 1984 I was present when a raid was conducted by CBI officers in the house of Smt. D.K. Bhandari at Church Road, Gangtok. I remained there during the search right from the morning till midnight.

.....Exhibit P-38 is also a receipt from Gangtok Municipal Corporation for Rs,290/- dated 27-4-1981 in the name of Smt. Dil Kumari Bhandari. Exhibit P-39 is also a receipt from the Gangtok Municipal Corporation for

Rs.2/- only dated 11-6-81 in the name of Smt. D.K. Bhandari. Exhibit P-40 is a letter written by Shri L.P. Tiwari, Chief Engineer, Power Department, Govt. of Sikkim to Smt. D.K. Bhandari dated 7th April, 1983. Exhibit P-43 is the letter sent by the Assistant Engineer (Revenue) Power Department to Smt. D.K. Bhandari dated 15th December, 1982 for Rs.526/-. Exhibit P-44 is another bill sent by the Assistant Engineer, Power Department to Smt. D.K. Bhandari for Rs.225/- dated 15-12-1982. Exhibit P-45 is a receipt issued by the Manager State Bank of Sikkim to Smt. Dil Kumari Bhandari for Rs.225/- dated 21-12-1982. Exhibit P-46 is also a receipt issued by the State Bank of Sikkim for Rs.526/- in the name of Smt. D.K. Bhandari dated 21-12-1982."

PW-31:

"It is true that the building known as Primulla Cottage was constructed with over all supervision by the said Mrs. D.K. Bhandari in the year 1981-82. It is true that Mrs. D.K. Bhandari used to make purchases of the building materials and payment of labourers were made by herself."

PW-39:

"I was Managing Director, State Bank of Sikkim in the year 1984. In fact I was appointed in the aid Bank in the year 1968. The State Bank of Sikkim deals with Government business, commercial business like any other commercial bank including loaning and depositing the amount.

On 2-7-1981 the State Bank of Sikkim had given a loan of Rs.50,000/- to one Mrs. Dil Kumari Bhandari for construction of a house at Church Road, Gangtok. Before sanctioning the loan we observe certain formalities these include the verification as to the ownership of the site where the construction is to be raised. A valid construction order issued by the competent authority, etc. We also require security for the repayment of the loan. In the construction cases like the present one the site and the house under construction itself is mortgaged with the Bank in lieu of the loan advanced to Mrs. D.K. Bhandari. In the present case the formalities required were duly completed and as such the loan was advanced.

Exhibit P-87 is a letter written by me to the Superintendent of Police CBI, New Delhi camp at Gangtok dated 3rd July, 1984. Exhibit P-88 is a copy of demand promissory Note for Rs.1.00 lakh executed by Smt. D.K. Bhandari dated 12th November, 1981 (objected to). Exhibit P-89 is a letter of waiver by which the Bank had retained the power to present the document to the loanee in

future. Exhibit P-90 is a mortgage bond for a sum of Rs.1.00 lakh executed by Smt. D.K. Bhandari dated 12th November, 1981. In the said bond the description of the properties mortgaged at the time of taking loan have been given. Exhibit P-91 is an undertaking given by Mrs. D.K. Bhandari for repayment of loan in half yearly instalment of Rs.25,000/- dated 12th November, 1981. Exhibit P-92 is the construction order issued by the competent authority in favour of Smt. D.K. Bhandari with respect to a building at Church Road, Gangtok. The document is dated 23-5-1981. Exhibit P-93 is an application submitted by Smt. D.K. Bhandari requesting for enhancing the loan amount as the earlier loan amount of Rs.50,000/- was insufficient for her to raise the construction in question. The application is dated 19-10-1981. Exhibit P-94 is an initial application for a loan of Rs.50,000/- dated 11th June, 1981. The document that is shown to me is a surety bond executed by one Shri N.B. Tiwari for the loan to be advanced to Smt. D.K. Bhandari amounting to rupees 1.00 lakh dated 12th November, 1981. Mrs. D.K. Bhandari repaid the entire loan advanced to her by the Bank.

CROSS EXAMINATION BY COUNSEL FOR ACCUSED

I cannot exactly remember as to when the loan was refunded to the Bank. I do not remember whether the loans were repaid after May, 1984. It is true that before sanctioning the loan the Bank normally makes thorough inquiry about the ownership of the land where the construction is to be raised. We were satisfied from the documents produced by Smt. D.K. Bhandari as well as from the enquiries made by us about the genuineness of ownership of the property belonging to Mrs. D.K. Bhandari. The total amount of loan advanced to Mrs. D.K. Bhandari towards construction of her building was Rs.1.00 lakh."

PW-52:

"..... I have filed a total No. of 136 documents inclusive of F.I.R., Gazette Notification and 28 seizure lists. It is true that 26 number of folders marked A to M were seized on 2nd June, 1984 by Shri D.N. Choudhury, P.W. 53 during raid and search in Primula Cottage at Church Road, Gangtok as per Exbt. P-121.

.....I have not filed all the 215 documents contained in the folder marked C in Exbt. P-121.I cannot say how many I have filed and how many I have not filed along with the chargesheet in Court even after going through the documents placed before me.....

Question: Is it true that folder marked F containing various documents like bills, vouchers, purchase of

construction materials, etc., having pages 1 to 100 were seized?

Answer: Yes. All those documents were being seized by CBI, during raid and search of Primula Cottage on 2nd June, 1984.

Question: How many of those 100 pages of documents were filed in Court and how many were not filed?

Answer: I cannot say how many of those 100 pages of documents from the folder marked F were filed in Court and how many of them were not filed in Court even after going through the documents placed before me.

Question: Is it true that the item Nos.11 and 12 were the partly used cheque books which were seized by CBI on 2nd June, 1984 under Exbt. P-121?

Answer; Yes it is true.

Question: Have you filed all the partly used cheque books in Court?

Answer: Those partly used cheque books were not filed in Court alongwith the chargesheet nor thereafter.

Question: PW 53 the Investigating Officer Shri D.N. Choudhury has deposed before this Court in this case that Smt. D.K. Bhandari is the absolute sole owner of Pine Printers, so now you say whether you are false or PW 53 D.N. Choudhury was false?

Answer: D.N. Choudhury was correct as he was the main Investigating Officer.

Question: So have you given a false statement in the charge sheet?

Answer: No. It must have been a typographical mistake.

Question: Did you not see that such a mistake was committed in the charge sheet by the typist at the time of submitting the charge sheet?

Answer: It might have gone unnoticed due to pressure of work.

Question: Do you admit that in Ranipool case against the accused you have deposed to the effect, "I am aware of the report of the Central Bureau of Investigation to the effect that about one building situated at Church Road, Gangtok popularly known as Primula Cottage belonged to Smt. D.K. Bhandari"

Answer: Yes, It is true.

It is true that even before the Hon'ble High Court of Sikkim at Gangtok in Criminal Revision No.4 of 1995 the issue of the Superintendent's report in R.C. 6 of 1984 was raised by the accused. It is true that even at the time of framing of charge in this case I was personally present before this Hon'ble Court. It is true that I was aware of the said SP's report in R.C. 6 of 1984 dated 19.6.1985.
1985 It is true that I was aware of the contents of the said SP's report in R. C. 6 of 1984 dated dated 19.6.1984.It is true that I am aware of the contents of the said SP's report dated 19.6.1985.....

PW-53:

I cannot say as to whether the F.I.R. in the present case and the other case relating to the same building i.e. Primula Cottage had been filed and registered on the same day. It is true I had also conducted some investigation in case No.RC.6/84 after the transfer of Mr. R.S. Dhankar who had been investigating the case. It is true that I concluded the investigation in RC.6/84. It is true that in RC.6/84 after thorough investigation by the C.B.I., the C.B.I. submitted a report in 1985 to the Government of Sikkim stating that the allegation made in the F.I.R. against the accused N.B. Bhandari had not been proved.

..... Shri Nar Bahadur Bhandari gifted these plots to his wife in February, 1981 on execution of a gift deed. Smt. D.K. Bhandari, wife of Shri Nar Bahadur Bhandari started construction of multi-storeyed building on said plot in May, 1981, after the approval of the building plan by the Executive Officer, Gangtok Municipal Corporation. She applied to the G.M.C. vide her letter dated 19.10.1982 for issue of occupancy certificate as construction of the building had been completed. Accordingly, occupancy certificate was issued on 22.10.1982.

.....
It is correct that Smt. D.K. Bhandari received total rent from the Power Department as an owner Rs.1,45,134/- as rent from the Sikkim Government, Power Department for occupancy as tenant for the period 1st February, 1983 to 15.6.1984.

..... It is a fact that Mr. Bhandari, the accused appeared and stated before me that the building in question of this case belonged to his wife and he had nothing to do about it."

[emphasis supplied]

53. From the depositions of the different prosecution witnesses extracted above, and the admitted position of the CBI in its report in RC-6/84-SPE/CIU(A) that the building in question was owned by Smt. D. K. Bhandari, wife of the appellant, it stands clearly established that it was constructed by Smt. D.K. Bhandari and owned by her and not by the appellant.

54. Apart from the above witnesses there are other prosecution witnesses who are tenants of the building being PW-14 and PW-18 who have deposed that they were tenants under Smt. D.K. Bhandari and paid rent to her. We also have PW-21, PW-22, PW-15 and PW-16 who are the hardware dealers who sold building materials like paint and



sanitary ware, payments of which were made by Smt. D.K. Bhandari. These witnesses have in most categorical terms corroborated the statement of PW-31, Churchil Subba, as regards the construction of the building under the over all supervision of Smt. D.K. Bhandari as he used to make purchases of the building materials on her behalf. These are overwhelming evidence which are contrary to the allegation of the prosecution that the building was held Benami by her on behalf of the appellant.

55. The learned trial Court has rejected the evidence of these witnesses on a finding that there was no cogent evidence that the money for construction of the building was arranged by Smt. D.K. Bhandari herself and that, the best person to prove this fact being Smt. D. K. Bhandari, having not been produced, adverse inference under section 114(g) ought to be drawn against him. In my view, the approach of learned trial Court does not appear to be correct. Under such circumstances, what ought to be the duty of the Court has been laid down in the case of ***Mohanlal Shamji Soni vs. Union of India : 1991 Supp (1) SCC 271*** where it has been held as follows: -

"10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the Code to compel either

the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the party withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under Illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take any active role in the proceedings in finding the truth and administering justice? It is well accepted and settled principle that a court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any code by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

56. Considering the fact that the question as to whether Smt. D. K. Bhandari was holding the property 'benami' being vital and if the Ld. Trial Court or the prosecution was of the opinion that she was being held back by the appellant, then either the Court on its own motion or on the prayer of the prosecution, ought to have resorted to the provision of Sec. 311 Cr.P.C. and summoned her for being examined her as a witness. This having not been done, it is impermissible for the prosecution to invoke the principle of adverse inference

against the appellant. The allegation that Smt. Bhandari did not appear before the I.O. despite notices, is in my view unacceptable as there are provisions in the Cr.P.C. to compel such appearance.

57. In the present case, when the prosecution witnesses themselves have corroborated the appellant's version and proved his case which is so apparent, producing additional evidence by the appellant would be unnecessary and redundant. It is not incumbent under the law upon Smt. D.K. Bhandari or for the appellant to prove her sources of income, which is a burden to be discharged by the prosecution. Apart from her not being an accused, the evidence on record is replete with the proof that she had sufficient income and, therefore, had the capability to construct the building. We may refer to the evidence of PW-3, PW-31, PW-32, PW-45 and PW-48 who have clearly proved that Smt. D.K. Bhandari had surplus money from the party fund, income from "Pine Printers" and "Aaja Ko Sikkim", income from house rent and income from loan. The relevant portions of whose statements are reproduced below:-

PW-3:

" After the election was over there was a party meeting where there was discussion about the funds of the party. At that time it was placed in the meeting that after deducting the expenditure an amount to the tune of Rs.11,20,000/- and odd was surplus. The meeting decided that the said surplus

money will be kept by Mrs. D.K. Bhandari in liquid form separately.

.....Subsequently the enquiry was made within the party regarding the surplus amount of Rs.11,20,000/- and odd belonging to the then Sikkim Janata Parishad Mrs. D.K. Bhandari told the meeting that she had diverted the amount for the construction of her house and for other purpose. It is true that since 1977 when Sikkim Janata Prishad Party was established and even after the said party was merged with the Indian National Congress the party office continued to remain in Primulla cottage and for that no rent was paid by the party to the house owner, and as such the party did not raise any objection on diversion of the money made by Mrs. D.K. Bhandari for the construction of the building and for other purpose.

It is true that all our party publications and printing matters was being carried in the Press namely Pines Printers from 1981 onwards. I used to devote 3 to 4 hours in the aid job and I used to remain in the press to look after the composition, proof reading etc. From 1981 onwards the business of the said Pine Printers was heavily increased. The said press used to earn from 14,000/- to 20,000/- per month from our party. Apart from this the said printing press used to get many other jobs both from government and private organisation. Normally a printing press gets about 50%of net profit."

CROSS EXAMINATION BY COUNSEL FOR ACCUSED

.....It is true that Mrs. D.K. Bhandari was very popular lady at that time. It is true that Mrs. D.K. Bhandari was elected twice as a Member of Parliament. It is true that initially we had begun with weekly paper by the name 'Aaj Ko Sikkim' gradually our business in the press developed. Subsequently it had become a flourishing business comparatively. It is true that till 1981 I used to maintain the books of accounts of the Press.

.....As far as I can guess Mrs. D.K. Bhandari used to get an average monthly income or Rs.15,000/- from the press."

PW-45:

..... Mrs. D.K. Bhandari was incharge of maintaining the cash amount for the party. She used to keep the collected amount in cash. It is true that after the Assembly Election of 1979 there was a party meeting where the detailed accounts with regard to the party fund was placed. There we came to know that about Rs.11,20,000/- (Eleven lacs twenty thousand) was the balance. It was decided in the meeting that the aid balance



amount was to be kept by Mrs. D.K. Bhandari in her custody separately. Even after the Assembly Election of 1979 we used to receive donation from the well-wishers as party fund. It is true that the Party Sikkim Janata Parishad was merged with Indian National Congress in July, 1981. It is true that the Office of the Sikkim Janata Parishad party used to be in the house of Mrs. D.K. Bhandari. The party did not use to pay any house rent for the said office to Mrs. D.K. Bhandari. It is true that some times in the year 1982 in our Executive meeting the question regarding balance kept with Mrs. D.K. Bhandari was raised in a party meeting. In the said meeting Mrs. D.K. Bhandari stated that she utilised the said amount of Rs.11,20,000/- for the construction of her building at Church Road as she stated that as she did a lot for the party and that she had not taken the house rent for the premises occupied by the party for running its Party Office. She also accepted the said statement.

..... I am still not in talking terms with Mr. Bhandari since then. Earlier I was a member of the present ruling party. But I am no longer a member of the same."

PW-48:

"..... At that time I was with Shri Bhandari in politics so I know that Chogyal gave him lot of money. It was in the record also that some money has been paid by the then Chogyal to Mr. N.B. Bhandari. Entry regarding this payment were recorded in the Register of the Party. Mrs. D.K. Bhandari was maintaining the Register of the Party. Myself and Prem Goyal had also seen the entries in the Register. The payments were made not only by the Chogyal but by other persons. I had stated all these things before the I.O. but he might not have recorded.

..... Mrs. D.K. Bhandari used to run one news paper under the caption 'Ajoko Sikkim' during the year 1982-84.....

..... As a owner of Printing press and also the owner of daily news paper I can guess the income of monthly of Mrs. D.K. Bhandari during 1982 to 1984 must be more than Rs.20,000/-. I have stated in my statement 101 that I had been a strong supporter of Shri N.B. Bhandari in political field.....

..... After the 1979 Election was over there was proper accounting of the party fund which was used to be maintained and kept by Smt. D.K. Bhandari wife of Shri N.B. Bhandari in liquid form. After 1979 Election was over there was surplus money in the fund of the party roughly about Rs.11



lakhs. (Rupees eleven lakhs). Mrs. D.K. Bhandari misused the party fund. She i.e. Mrs. Bhandari used this surplus fund for the construction of her building Primula cottage. With the said surplus fund of the party Mrs. D.K. Bhandari extended and improved and further raised structure of 'Primula Cottage'. There was lot of disputes in executive meeting for using surplus fund by Mrs. Bhandari in the further construction of Primula cottage by her. Mrs. Bhandari pleaded in the meeting that a portion of her house had been used as a party office from long time for which no rent was paid to her. She also further pleaded that she had also gave lot of labours in collecting the funds and doing party works. So considering everything the members in the meeting fully excused and pardoned her for use of party fund in her building. And this fact was also embodied in the Resolution book of the party.

..... It is correct that like me Mr. Prem Prakash Goyal was a strong supporter of Sikkim Janata Parishad led by Mr. N.B. Bhandari. I left Mr. Bhandari's party in 1985 and since then we are not in talking terms."

"The firm Jain Co. belongs to me which was established in the year 1975. My firm deals with books, newspapers and stationary items. In the year 1984 also I was having the same business. I was the agent of important national newspapers as well as the local papers, including the newspaper AAJ KO SIKKIM. I do not remember the exact price of the said newspaper. The weekly circulation of the said newspaper was not more than 25 copies. I used to get 30% selling discounts in the said newspaper.

CROSS EXAMINATION BY COUNSEL FOR THE ACCUSED

It is true that in the said newspaper AAJ KO SIKKIM there used to remain advertisement column. Apart from the advertisement there used to be the results of lotteries, of different states. It is true that apart from me the newspaper AAJ KO SIKKIM was being sold by various pan shops and other book sellers also. It is also correct to state that the said newspaper used to get full page advertisement."

PW-52:

Question: Is it true that you have not filed in Court the said document, search list showing documents, registers, account books were seized from the premises of Pine Printers by CBI Inspector B.S. Dhankar on 2nd June, 1984?

Answer: It is true that I have not filed.



Question: Did you see and check the documents those were seized from the Pine Printers premises on 2nd June, 1984 i.e. on the raiding day?

Answer: I also checked those documents but I did not rely upon them in coming to conclusion of Smt. Bhandari's income from Pine Printers Press during the check period at Rs.53,537/-.

Question: What was the basis of your conclusion that Smt. Bhandari earned only Rs.39,555/- from the newspaper known as 'Aaj Ko Sikkim', owner and edited by her during the check period?

Answer: I have based the conclusion from bank accounts and examination of witnesses namely S.K. Jain.

Question: Did S.K. Jain tell you what was the income from 'Aaj Ko Sikkim'?

Answer: No.

Question: I suggest to you that you suppressed all the documents seized from Pine Printers Press on 2nd June, 1984 by Inspector D.S. Dhankar of CBI to make out a false charge against the accused?

Answer: It is not correct.

Question: Have you produced the sale receipt by which Smt. Bhandari purchased the Press Pine Printers from the previous owner Shri I.N. Pradhan?

Answer: I have not filed the document (sale receipt) by which Smt. Bhandari purchased the Press from previous owner Shri I.N. Pradhan at a consideration of Rs.44,500/-.

Question: Have you cited as a witness the then S.P. Shri R.N. Kaul who signed the FIR and registered the instance case?

Answer: No.

Question: Is it true that you filed the Final Report U/S 173 Cr.P.C. against the accused?

Answer: It is true I filed the Final Report on 23.9.98 and the said Final Report was accepted by the Court in the year 2001 and the accused was discharged on the basis of the Final Report submitted by me.

Question: Is it a fact that when in the present case a petition for discharge was made before this Special Court for discharging the accused relying on the Report dated 19.6.1985 of the S.P. Shri R.N. Kaul in R.C. No.6 of 84?

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Answer: Yes I am aware.

Question: Is it a fact that you received all the papers relating to investigation including the report of the said S.P. dated 19.6.85 from the CBI Department in 1990?

Answer: No it is not correct.

.....It is true that there was no joint bank account or any property in the joint name of Smt. Bhandari and the accused.

..... It is true I have mentioned in the disproportionate asset list in the charge sheet that there was bank balance in the name of Shri N.B. Bhandari and Smt. Bhandari totalling Rs.22,065.09 but I cannot say how much money was in the bank balance of N.B. Bhandari and Smt. Bhandari separately.

.....It is true that in the disproportionate list of the asset of the accused I mentioned the figure Rs.86,323.95 being the investment in the Pine Printers Press. I cannot say whether the accused was in any way concerned with the investment of the said Pine Printers.

..... It is true that two cheques of Rs.1 lakh and 5 lakhs respectively drawn on account of Shri Kunzang Tobden were seized in connection with this case. It is a fact that the above two cheques seized in connection with this case have not been included in the list of documents filed in Court. I cannot say where these two cheques are lying. It is not correct that these two cheques had been deliberately suppressed for the reason that these two cheques would have thrown and helped the defence case. I do not remember whether I had any knowledge about these two cheques or not.

..... I deny that I in collusion with PW 53 Shri D.N. Choudhury suppressed all the looted away documents and registers from the Office of the political party headed by the accused in order to suppress the truth that there was balance or surplus fund of Rs.11,20,000/- in the party fund of election surplus of 1979. I deny that had those documents been honestly produced that would have proved that the said surplus fund was diverted by the treasurer of the party Smt. D.K. Bhandari towards her building construction and the same was ratified by the executive committee of the party. I deny that had those documents been produced in Court would have revealed that the accused was allowed as the party President to draw monthly allowance of Rs.10,000/- per month from the party fund since prior to 1979.

..... It is true that it is the duty of the CBI to keep in safe custody all documents relevant."

PW-53:

"..... As per search list dated 2.6.1984 the searches were conducted in the presence of Smt. Dil Kumar Bhandari and independent witnesses.

..... It is a fact that Mrs. Bhandari was the owner in occupation of the press known as Pine Printers. It is wrong to say that she was the partner of Pine Printers. It is a fact that certain cheques numbering 16 for an amount of Rs.108715.77/- were drawn on State Bank of Sikkim by Mrs. D.K. Bhandari to clear the prices of the building materials purchased by her from various shop keepers and parties towards the construction of the building in question in this case.

..... It is a fact that on the direction of Mrs. D.K. Bhandari the State Bank of Sikkim debited the amount Rs.7300/- from the account of Pine Printers and made the said amount as fixed deposit in her name. It is a fact that during investigation I seized from the State Bank of Sikkim 14 credit vouchers being the product of drafts sent from different places, received and accounted in the name of Messrs. Pine Printers. It is a fact that the account in the name of Messrs. Pine Printers was operated by Mrs. D.K. Bhandari alone.

..... Volunteers to say that the assets had been clubbed together as per the provision of law. Section 5(1)(e) of Prevention of Corruption Act of 1947 provides for clubbing of income of the accused and his family members or dependants. It is true that clubbing of assets together under the law is permissible only after when separate individual assets have been indicated. I cannot say at this stage the bank balance of the accused during the check period. It is true that the disproportionate assets to the tune of Rs.16,37,270/- was the outcome result of the investigation in this case against the accused.

..... I have also based my calculation of income derived by Smt. D.K. Bhandari from Pine Printers principally from the version of the Manager, Churchill Subba P.W. 31. It is a fact that Pine Printers received Rs.88,994/- from out station customers by drafts and banker cheques during the period 25.9.1981 to March, 83 which were deposited for encashment with State Bank of Sikkim, Pine Printer's Current Account, 'Aaja ko Sikkim', a newspaper owned and edited by Smt. D.K. Bhandari

and the account was also operated by loan signator of Smt. D.K. Bhandari.

..... It is a fact that the said Jupiter Publicity Company paid to 'Aaja Ko Sikkim' during the period May, 1981 to June, 1984 the total sum of Rs.1,52,108/- against 'Aaja Ko Sikkim's' bill Rs.1,55,345.65.

..... It is true that it has not been mentioned in the seizure memo Exbt. P-101 that these two cheques for an amount of Rs.6,00,000/- in total had been seized in connection with a different case i.e. Cigarette Scam. I must have mentioned in my case diary that these two cheques had been seized in connection with Cigarette Scam case. I have not examined Mr. Kunzang Topden relating to these two cheques.

.....It is true that when a number of documents are seized during the investigation of the case and if some of the documents seized are not relevant to the case, it is the duty of the investigating officer to return those irrelevant documents to the person from whom they had been seized after taking permission from the Court. It is a fact that I searched Primula Cottage on 2.6.84 and seized 26 folders containing various documents from 3rd and 4th floor of Primula Cottage in occupation of the accused. It is not a fact that I had the preconceived notion that Primula Cottage belonged to the accused even before the search. At the time of search accused was not present. It is a fact that I seized a folder containing vouchers, cash memos of steel, bricks, wood, cement and various other construction materials, electricity fixtures, furnitures etc. 215 in numbers. It is true I have not brought all the 215 nos. of vouchers/cash memo on record of this instant case.

.....It is true that I searched and seized the folder item No.21 in the search list Exbt. P-121 and the said folder was marked as H and the said folder contained revenue receipts form, water supply connection papers, loan papers for Rs.6,00,000/- total pages 1 to 12. I have not filed the document relating to loan papers for Rs.6,00,000/- in this case before the Court though it was seized by me. It is not a fact I have suppressed the loan papers for Rs.6,00,000/- in order to deflate the source of money of Smt. D.K. Bhandari for construction of Primula Cottage by her during the check period.

..... The said list does not contain the loan paper of Rs.6,00,000/-.

..... I did not make any inquiry as to where the Sikkim Janata Parishad which was subsequently converted into Congress office was located. On this aspect I have no



knowledge. I do not have any document that I asked any of the Sikkim Janata Parishad office bearers to produce their books of accounts. I cannot say who were the office bearers of Sikkim Janata Parishad. I did not make any inquiry over the matter. I have not examined any high office bearers or treasurer of Indian National Congress at Delhi Headquarter in relation to the instant case - office bearers who held office during the period 1981 to May, 1984.

..... It is not a fact that I most arbitrarily clubbed together the properties owned by Smt. D.K. Bhandari and the accused together instead of showing separately to help the cause of justice and to come to a correct conclusion.
No other fixed deposits was found in the name of the accused or his minor children."

[emphasis supplied]

58. From the above extracts of the oral testimony of various witnesses, the following facts appear to be clearly established:-

- (a) That the appellant and his wife after resigning from their services as Teachers, had joined politics and launched a political party "Sikkim Janata Parishad".
- (b) Having lost, in the first election held in 1975 appellant again contested with his new party in 1979 in which he won by majority of the seats and became the Chief Minister.
- (c) The appellant had received large amount of donations for running the political party. After the elections of 1979, there was a surplus fund of Rs.11,20,000/- which was kept in the custody of Smt. D.K. Bhandari, wife of the appellant which

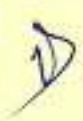


she later diverted for construction of the building "Primula Cottage" at Church Road, Gangtok.

- (d) Smt. D.K. Bhandari owned a press named "Pine Printers" and ran a news paper "Aaja Ko Sikkim" during the check period from which she earned sufficient income.
- (e) Smt. D.K. Bhandari had taken a building loan of Rs.1,00,000/- from the State Bank of Sikkim.
- (f) Smt. Bhandari had taken loan of Rs.6,00,000/- from N.T. Ladhaki for construction of the building.
- (g) Construction of "Primula Cottage" building was done under the supervision and control of Smt. D.K. Bhandari who had made all payments against purchases of construction materials.
- (f) The appellant received Rs.10,000/- per month from the party as allowance entitled to him as the President.

59. Therefore, there can be no manner of doubt that the building "Primula Cottage", in fact, was owned by Smt. D.K. Bhandari and that she had the necessary pecuniary resources and means to construct that building.

60. It is of significance to note that the above circumstances have been established by the prosecution witnesses in their oral testimony, the material parts of which





have remained uncontroverted and un-demolished. It is quite clear from the list of assets enumerated earlier except for the one contained in Sl. No.1, i.e., income from salary of the appellant, the rest are obviously those of his wife Smt. D.K. Bhandari. In other words, the prosecution has proceeded under the presumption that the income of the wife is the income of the appellant, i.e., their incomes have been clubbed together and, that benami nature of the holdings by the wife was inherent in them not requiring any proof.

61. In the case of **Arjun Dev Kohli v. State of Jammu and Kashmir and another** reported in **1999(4) Cri.L.J. 4967**, a Bench of the Court relying upon the decisions of the Hon'ble Supreme Court held as follows: -

"24.Mr. Bakshi the learned counsel, has invited the attention of the Court to bring round his point citing AIR 1977 SC 796: (1977 Cri.L.J. 566) (Krishnanand Agnihotri vs. State of M.P.). In that case, it was contended that the amounts lying in fixed deposit in the name of Shanti Devi as an asset belonging to the appellant and that Shanti Devi was a benamidar of the appellant.

26. He has also relied upon the judgment reported as AIR 1980 SC 727 (Bhim Singh v. Kan Singh). In that case, the dispute was with regard to the sale of house by Maharaj by means of Patta, the consideration was deposited by 'B', but the Patta was issued in the names of the plaintiffs. The Court held it that the treatment was not benami and 'B' had acquired the suit house with his money, with the intention of constituting 'A' as the absolute owner thereof. The Supreme Court rejecting the contention of the defendant with regard to the benami transaction held that :



"Two kinds of benami transactions are generally recognised in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The question whether a transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case. The principle underlying the former case is also statutorily recognised in S.82 of the Indian Trusts Act, 1882, AIR 1957 SC 49, Relied on."

"The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus (1) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) If it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the transaction and their subsequent conduct, etc."

29.....The evidence such as sale deed and memorandum of partition, referred in the judgment of the Special Tribunal is also on record of the respondent No.2 and being such evidence in his possession, it was obligatory on the part of the respondent No.2 to know the status of the property and collect evidence with regard to the benami transaction. No evidence to that effect has been found on record, as prima facie proof of the property is benami transaction."

[emphasis supplied]



62. We may refer to the case of ***Subhash Kharate v. State of Madhya Pradesh: 2000 Cri.L.J. 1178(MP)*** which also deals with properties standing in the name of the wife clubbed with that of the accused husband. Similar is the position in the cases of ***P. Satyamurthy v. State of Andhra Pradesh : 1992(4) SCC 39, State Inspector of Police Vishakhapatnam vs. Surya Sankaram Karri : (2006) 7 SCC 172*** and ***N. Sreemala v. State of Andhra Pradesh 2003 Cri.L.J. 2956(AP).***

63. In the case of ***T. Subramaniam v. State of Tamil Nadu: 2006(1) SCC 401***, it has been held that the explanation given by the appellant immediately after the incident clearly explains all the circumstances and raises not only a reasonable but very serious doubt about the amount having been received by him as illegal gratification and that if two views are possible on the basis of the material on record the only one which leads to a sole and an escapable conclusion of guilt of the accused would be accepted.

64. When we test the present case on the anvil of the law postulated above, it is quite manifest that the prosecution has not at all discharged the burden of proof required. On the contrary, it is on record that the appellant had most unambiguously and in categorical terms been





stating right from the beginning that the house was constructed by his wife, Smt. D.K. Bhandari and that he had no knowledge as to her sources of income from which such construction was made by her. This is also an admitted position of the prosecution. We may refer to the closure report in case No.RC-6/84-SPE/CIU, (Exbt.A), which also involved the very "Primula Cottage" building in which the Investigating Officer, while submitting his closure report of the case to the Government, has recorded that the appellant had stated that the house belonged to Smt. D.K. Bhandari. It may be noted that the report is of the year 1985. PW-39, the Investigating Officer in this case also stated in categorical terms in his deposition that the appellant had appeared before him and that the building in question belonged to his wife and he had nothing to do with it. Even before the learned trial Court on being asked on the charge the appellant has given the same reply which again is repeated in his reply to the question put to him under Section 313 of the Cr.P.C. It was, therefore, essential for the prosecution to have led evidence to prove beyond any reasonable doubt that the property was being held benami by Smt. D.K. Bhandari. This requirement is also clearly laid down in Section 5(1)(e) which contemplated that "if he or any person on his behalf is in possession of property disproportionate to his known sources of income".





65. Thus, the very section also mandates the prosecution to prove that any person on behalf of the appellant, (in present case his wife) was indeed holding the questioned property which admittedly the prosecution has failed. On the contrary, the prosecution witnesses have corroborated the consistent stand of the appellant. Mr. Vaid's submissions that the wife being the "Ardhangini" and living together with the appellant would be sufficient to infer that the transfer of the land by him in favour of Smt. Bhandari was with the oblique motive to accommodate his ill gotten money, in my view, is difficult to accept. In law, there is no such presumption as such gesture by a husband towards his wife is quite natural and that a husband and wife can own and possess pecuniary resources and assets separately in their respective names earned by themselves. This aspect of the matter appears clearly to have been overlooked by the learned trial Court which renders the impugned judgment quite unsustainable.

 **66.** From the evidence that have been discussed, it is seen that Smt. D.K. Bhandari had sufficient means to construct the building. This is subject to the legal position that she is not obliged to prove such capability as she is not an accused. The prosecution has not at all made any effort to prove that the building is being held benami by Smt. D.K.



Bhandari. The six circumstances which the prosecution claims to have been established leading to purported inference that the building in question was built by the accused himself, in my view do not form a chain so intrinsically connected that it leads to the sole hypothesis of the appellant holding the property in question benami in the name of his wife.

67. Apart from the findings that have been recorded above which clearly displaces the claim of proof of the circumstances, the proposition of the Ld. Trial Court that the defendant has not taken the responsibility to prove that Smt. D.K. Bhandari was financially capable of constructing the building and that, on the contrary there are proof that she came from a moderate family and worked as School Teacher and as L.D.C. later, is alien to the well settled principle of the burden of proof alluded to above. In any case, we find proof to the contrary. It is manifestly clear that the prosecution has failed to discharge the initial burden placed upon it under the law.

68. We also find that the learned trial Court by the impugned judgment has rejected three significant incomes either of Smt. D.K. Bhandari or of the appellant which are:-

- 
- (i) Loan of Rs.6,00,000/- received from N.T. Ladhaki for the purpose of construction of "Primula Cottage" building;

- (ii) Surplus fund amounting to Rs. 11,20,000/- of "Sikkim Janata Parishad" after 1979 General Assembly Elections; and
- (iii) Monthly allowance @ Rs.10,000/- per month drawn by the appellant in the capacity of the President of the party out of the party fund.

69. These incomes have been rejected on the grounds indicated in each of the income which are dealt with in seriatim as under:-

(i) Loan of Rs.6,00,000/-

70. The learned trial Court held that if the loan documents were seized by the Police, it was incumbent for the appellant to have prayed for directions to be issued against the C.B.I. to produce the documents and that if the documents would have been explained his position then he would have certainly taken necessary steps for their production during the course of trial but the appellant failed to explain as to why reasonable steps have not been taken by the defence. The further view of the learned trial Court was in loan transactions, the original documents always remain with the creditor and, therefore, if the appellant has suppressed the documents, the accused would have easily produced it from the creditor. In my view, the findings do not appear to be sound. It is an admitted position as revealed from the deposition of the Investigating Officer, PW-53, that the loan document was indeed seized by the CBI

vide Seizure Memo Exbt.121 and was not returned to the appellant or his wife. Under such circumstances, the question of producing the original documents from the creditor did not and could not arise at all under the admitted position. In the case of **Chittaranjan Choudhury vs. State of Bihar : (1987) 2 SCC 104**, it has been held as follows: -

"6.This evidence is noticed only to be rejected. In our opinion where, as in the instant case, the defence is founded on a relevant and vital document seized from the custody of the accused and not deliberately produced, it is difficult to sustain the conviction of the accused. It was the duty of the prosecution to produce the release order No.115 in order to remove all doubts by showing that the goods which were being despatched by the appellant, were not covered by the release order....."

71. Therefore, the findings of the Ld. Trial Court are quite perverse and, I am of the view that it stands fully established that Smt. D.K. Bhandari had taken a loan of Rs.6,00,000/- from N.T. Ladhaki for the construction of "Primula Cottage" building.

(ii) Surplus election fund of Rs.11,20,000/-

72. The learned trial Court has rejected the unrebutted evidence of PW-3 that there was a surplus fund of Rs.11,20,000/- which was kept by Smt. D.K. Bhandari in liquid form and that later she utilised that amount for construction of her house and the evidence of PW-45 and PW-48 which corroborated the oral testimony of PW-33 was not believed, as they were hostile witnesses. The view of



the learned trial Court was that, in cases pertaining to economic offences, it is expected that oral evidences are supported by documentary evidence and since there was no documentary evidence to support oral evidence in the form of proper books of accounts and audit reports since party funds are required to be operated by observing financial rules, their evidence could not be believed. The learned trial Court was also of the view that adverse presumption could not be drawn against the prosecution for suppression of the loan documents as the appellant had not come with clean hands because "he who demand equity must come with clean hands." Such reasonings of learned trial Court for rejecting evidence are, to state the least, quite unknown in criminal jurisprudence and the law of evidence. In the first place, the statement of PW-3 that there was surplus fund of Rs.11,20,000/- has gone uncontroverted. This finding has been fully corroborated by PW-45 and PW-48. Oral evidence is one of the methods of proof provided under Section 59 and Section 60 prescribes that oral evidence must be direct. We may for convenience reproduce Sections 59 and 60 below: -

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"59. Proof of facts by oral evidence – All facts, except the [contents of documents or electronic records] may be proved by oral evidence.



60. **Oral evidence must be direct** – Oral evidence must, in all cases whatever, be direct, that is to say –

If it refers to a fact which could be seen, it must be the evidence of witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Provided also that, if oral evidence refers to the existence of any material thing than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

[emphasis supplied]

73. The aforesaid provisions clearly lay down that all facts may be proved by oral evidence and that the oral evidence must be direct.

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74. In the present case, PW-3, PW-45 and PW-48 had been physically present at the time when Smt. D. K. Bhandari had been given custody of the surplus fund and also when the issue with regard to the settlement of the surplus fund diverted by Smt. D. K. Bhandari, was discussed. Therefore, oral evidence by such persons fall within the purview of Section 60 of the Evidence Act, 1872. Moreover, these are prosecution witnesses. Therefore, there can be no reason why their oral testimony should not be accepted.

75. Although, PW-45 and PW-48 have been declared hostile, their testimony to the effect that there was surplus fund of Rs.11,20,000/- of the party after the elections which was kept in the custody of Smt. D.K. Bhandari but was used by her for construction of the "Primula Cottage" building have remained un-demolished. Moreover, these two witnesses cannot be called partisan witnesses as it is in the evidence that they had fallen apart with the appellant and were not even in talking terms with him. Even if PW-45 and PW-48 have been declared as hostile witnesses, it is a settled law that the evidence of such witnesses need not necessarily be rejected. In this context, we may refer to the case of **Balu Sonba Shinde vs. State of Maharashtra: (2002)7 SCC 543** in paragraph 14 of which it has been held as follows:-



"14. It is at this juncture the prosecutor declared her a hostile witness and prayed for permission to cross-examine the witness - upon, however, the leave being granted, PW 5 totally decried the factual aspect as contained in the complaint ledged, though, however, the thumb impression was admitted - while it is true declaration of a witness to be hostile does not ipso facts reject the evidence - and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of - but the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. Reference in this context may be made to the decision of this Court in *State of U.P. v. Ramesh Prasad Misra* wherein this Court stated: (SCC p.363, para7)

"It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

[emphasis supplied]

76. We may also refer to the case of ***Rabindra Kumar Deb vs. State of Orissa: AIR 1977 SC 170 (Para 12)***

where it has been held as under:-

"12. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. In *Bhagwan Singh v. State of Haryana*, (1976) 1 SCC 389, 391-92 = (AIR 1976 SC 202 at p. 203), Bhagwati, J., speaking for this Court observed as follows:

"The prosecution could have been avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."

[emphasis supplied]



77. Following the above ratio and on close scrutiny of the evidence of PW-45 and PW-48, I do not find any difficulty in accepting their oral testimony as they have fully corroborated the uncontroverted testimony of PW-3. It is significant to note that the evidence relied upon by the appellant are the testimonies of the prosecution witnesses and not that of the defence. When the prosecution witnesses have proved the case of the appellant, it would be superfluous and redundant to adduce any further evidence by him. The law is well settled that it is not necessary for the accused to adduce evidence aliunde. If the explanation which has been given by the accused is corroborated by the evidence of the prosecution, the burden of the accused stands discharged. In the case of ***K. Veeraswami v. Union of India: 1991(3) SCC 655*** in para 72 it has been held that "The burden of proof placed on the accused is an evidential burden though not a persuasive burden. The accused however, could discharge that burden of proof "on the balance of probabilities" either from the evidence of the prosecution and/or evidence from the defence."

[emphasis supplied]

78. Considering the position of law, I have no hesitation to hold that it has been proved and established beyond reasonable doubt that there was a surplus fund of



Rs.11,20,000/- out of the party fund of the appellant after the elections of 1979 which was kept in custody of his wife Smt. D.K. Bhandari and that Smt. D.K. Bhandari utilised that amount for the construction of the "Primula Cottage" building. The submission of the learned Special Public Prosecutor that such income cannot be treated as a valid income relying upon the decision of **Andhra Pradesh High Court in N. Rama Krishnaiya v. State of Andhra Pradesh (supra)**, in my view cannot be applied in the present case. It is in evidence that Smt. D.K. Bhandari and the appellant were both in politics and the fund of the political party are accepted forms of income. It may be relevant to note that during the material time, the stringent condition of the political parties requiring to maintain books of accounts and furnishing income tax returns were not in vogue particularly in the State of Sikkim. The income definitely is not a windfall but receipt by the political party of the appellant as contributions to the party fund. Therefore, the amount of Rs.11,20,000/- is an income which is valid falling within the meaning of known sources of income.

(iii) Monthly allowance @ Rs.10,000/- from party fund.



79. This income of the appellant has come in the oral testimony of PW-3 which was corroborated by PW-45. The learned trial Court has again rejected the evidence of PW-5



on the ground that he is a hostile witness and that the appellant has failed to produce any documentary evidence in support of the claim. We have already found that the testimony of PW-3 has remained uncontroverted which has been corroborated by PW-45. PW-45 although declared as a hostile witness has maintained the position that the appellant received the allowance from the party fund. The prosecution has failed to demolish this part of the statements of PW-45. He is not a partisan witness, as he was not even in talking terms with the appellant. Such being established position derived from the testimony of the prosecution witnesses themselves, the need for the appellant to produce evidence aliunde to prove such fact by producing documents as opined by the learned trial Court would be irrelevant, superfluous and redundant. Under such circumstances, the finding of the learned trial Court on this account stand set aside and it is hereby held that the appellant was drawing an allowance of Rs.10,000/- per month from the party fund which would amount to Rs.6,50,000/- during the check period.

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80. From the above, it is evident that the prosecution in the first instance have not been able to establish as correct the valuation of the building considered as the disproportionate asset. This being the fundamental



requirement in a disproportionate asset case, the case of the prosecution fails on this account alone. Secondly, the allegation of the prosecution that the building in question is being held by the appellant benami in the name of his wife Smt. D.K. Bhandari has not been proved by the prosecution at all as required under the law. The prosecution, therefore, fails on this account also. Thirdly, although not necessary under the law, it has been fully established that Smt. D.K. Bhandari had the necessary means to construct the "Primula Cottage" building and that the questioned building is owned and was possessed by her. It is in evidence that after resigning from Government Service, the appellant and Smt. D. K. Bhandari had launched a political party "Sikkim Janata Parishad" of which Smt. D.K. Bhandari was a member and played an active role and was responsible for seeking contributions to the party fund. It also stands established that she had owned the press "Pine Printers" and ran a daily news paper "Aaja Ko Sikkim" from which she earned sufficient income. It is also in the evidence that she had taken loan of Rs.1,00,000/- from the State Bank of Sikkim, Rs.6,00,000/- from N.T. Ladhaki and other miscellaneous incomes which we need not elaborate upon. These facts have emerged from the prosecution evidence and have stood the test of cross-examinations wherever, resorted to. Under



such circumstances, there can be no reason as to why such income of Smt. D.K. Bhandari need not be accepted.

81. We may consider this case in another aspect also. Assuming that clubbing the income of Smt. D.K. Bhandari with that of the appellant is permissible, we find the following:-

(i) The total income of the appellant accepted by the trial Court (at page 25 of the impugned judgment under the head para 23)	-	Rs.6,78,843.24
(ii) Monthly allowance of Rs.10,000/- from party fund received by the appellant during the check period	-	Rs. 6,50,000.00
(iii) Loan taken from N.T. Ladhaki	-	Rs.6,00,000.00
(iv) Surplus party fund	-	Rs.11,20,000.00
Total:	-	Rs.30,48,843.24

Expenditure accepted by the trial Court	-	Rs. 2,19,509.56
Savings	-	Rs.28,29,333.68

Value of the only asset in possession of the appellant as per the prosecution and accepted by the trial Court	-	Rs.13,54,639.00
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Therefore, Rs.27,29,333.68 (Savings)

(-) Rs.13,54,639.00 (the value of building accepted by Court)
 = Rs.14,74,694.68

82. From the above, therefore, even considering the value of the building to be correct, it is within the income of the appellant and his wife clubbed together, though not permissible, which they earned during the check period. The case therefore, fails on this account also.

83. Now, let us assume that Rs.11,20,000/- is not permissible to be included as a valid income, the total income would be as follows: -

(i) Income accepted by the Court	-	Rs. 6,78,843.24
(ii) Income of the appellant Monthly allowance @ Rs.10,000/- per month During the check period	-	Rs. 6,50,000.00
(iii) Loan from N. T. Ladhaki	-	Rs. 6,00,000.00
Total	-	Rs.19,28,843.24
(iv) Expenditure accepted by Court	- (-)	Rs. 2,19,509.56
Balance (Savings)	-	Rs.17,09,333.68
(v) Value of the building accepted by Court	-	Rs.13,54,639.00
Therefore surplus	=	Rs. 3,54,694.68

84. It can, therefore, be seen that the appellant would have a surplus of Rs.3,54,694.68 even after deduction of the

value of the building thereby bringing it within the known sources of income of the appellant assuming that clubbing the income of his wife with his is permissible.

85. It may be noted that apart from the above, the learned trial Court has accepted certain other incomes which are as under:-

(i)	Income of house rent by Smt. D.K. Bhandari	Rs.1,27,854.00
(ii)	Income from loan taken from The State Bank of Sikkim by Smt. D.K. Bhandari	Rs.1,26,622.00
(iii)	Income from debentures	Rs. 1,245.00
(iv)	Income from "Pine Printers"	Rs. 88,994.00
(v)	Income from news paper "Aaja Ko Sikkim"	Rs.1,70,175.55
(vi)	Income from sale of land by the appellant	Rs. 22,000.00
Total		= Rs.5,36,890.55

86. When we add these accepted income, to the surplus of Rs. 3,54,694.68 arrived at above, the savings of the appellant would come to Rs.8,91,585.23. The value of the "Primula Cottage" building, even assuming the valuation to be correct, and that it is being held benami by his wife, clearly falls within the income of the appellant.



87. Therefore, considering the prosecution case on all accounts, I have no hesitation to hold that they have failed to prove the case as required under law.

88. For the reasons stated above, the appeal succeeds and is hereby allowed. The impugned judgment and sentence passed by the learned Special Judge, Prevention of Corruption Act, East and North Sikkim at Gangtok, is hereby quashed.

89. No order as to costs.

90. The appellant is acquitted of the charges framed against him and is released from bail and consequently his bail-bond stands cancelled.

91. A copy of this judgment be transmitted to the learned Special Judge, P. C. Act, East and North Sikkim at Gangtok for its due compliance.

92. The records of the learned trial Court be sent back forthwith.



(**S. P. Wangdi**)
Acting Chief Justice
09.08.2011

Index : ☒ Yes / ☐ No

Internet : ☒ Yes / ☐ No